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Reform of the criminal justice system: achieving effectiveness and equity

Restorative justice

Report of the Secretary-General

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I. Introduction

1. The present report is submitted to the Commission on Crime Prevention and Criminal Justice in accordance with Economic and Social Council resolutions 1999/26 of 28 July 1999 and 2000/14 of 27 July 2000.

2. In its resolution 2000/14, the Economic and Social Council requested the Secretary-General to seek comments from Member States and relevant intergovernmental and non-governmental organizations, as well as the institutes of the United Nations Crime Prevention and Criminal Justice Programme network, on the desirability and the means of establishing common principles on the use of restorative justice programmes in criminal matters, including the advisability of developing an instrument. Preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters were annexed to the resolution for consideration.

3. In resolution 2000/14, the Council also requested the Secretary-General to convene, subject to the availability of voluntary contributions, a meeting of experts selected on the basis of equitable geographical representation to review the comments received and to examine proposals for further action in relation to restorative justice. The meeting of the Group of Experts on Restorative Justice was hosted by the Government of Canada in Ottawa, from 29 October to 1 November 2001. The report of the meeting is before the eleventh session of the Commission as an addendum to the present document (E/CN.15/2002/5/Add.1).

4. The present report contains an analysis of the comments received by the Secretary-General, pursuant to resolution 2000/14. The report of the meeting of the Group of Experts includes the recommendations of the Group, as well as the revised draft principles on the use of restorative justice, which were reviewed and amended at the meeting.

II. Background

5. In recent years, restorative justice has been given considerable attention by practitioners and policy makers as an alternative approach to criminal justice practices. It was discussed during the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10 to 17 April 2000.[1] Participants agreed that the concepts of restorative justice should be fundamental elements in any discussion of accountability and fairness to offenders and victims in the justice process. The philosophy behind restorative justice was to manage the harm done and to restore the offender and the victim to their original status as far as possible. The participants were of the view that restorative justice presented alternative criminal justice options to established modes of trial and punishment and that it sought to include the community and society as a whole in the restorative process.

6. Restorative justice is also dealt with in paragraph 27 of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, adopted by the Tenth Congress (General Assembly resolution 55/59, annex). Following the Tenth Congress, a plan of action on restorative justice was developed and adopted by the Commission on Crime Prevention and Criminal Justice at its tenth session.[2] At the same session, the Commission noted that some Governments had expressed interest in the negotiation of a new international instrument dealing with restorative justice and mediation. Restorative justice has also been discussed at regional conferences. A national teleconference on restorative justice sponsored by the National Institutes of Correction was held in the United States of America in 1996 and a seminar on mediation and other means for alternative settling of disputes was held in Plovdiv, Bulgaria, in December 2000.

III. Analysis of comments provided

7. On 7 December 2000, the Secretary-General sent a note verbale to Governments and to relevant organizations inviting them to provide their views and observations pursuant to Economic and Social Council resolution 2001/14. By the end of May 2001, 37 Governments had responded: Argentina, Australia, Austria, Belarus, Belgium, Bolivia, Bulgaria, Canada, Costa Rica, Denmark, Ecuador, Fiji, Germany, Ireland, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, New Zealand, Norway, Oman, Pakistan, Peru, Philippines, Qatar, Republic of Korea, Saudi Arabia, Sierra Leone, Slovakia, South Africa, Sweden, Turkey, Ukraine,

United Kingdom of Great Britain and Northern Ireland and United States. Two entities of the United Nations system, the Division for the Advancement of Women of the Department of Economic and Social Affairs of the Secretariat and the Office of the Prosecutor for the International Tribunal for the Former Yugoslavia, also responded, as did two institutes of the United Nations Crime Prevention and Criminal Justice Programme network, the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders and the International Centre for Criminal Law Reform and Criminal Justice Policy.

8. The following non-governmental organizations also responded: American Correctional Association, Andean Commission of Jurists, Asian Center for Youth, Defence for Children International, Friends World Committee for Consultation, International Community Corrections Association, Organismos no Gubernamentales del Estado de Sonora and Prison Fellowship International.

A. Comments on the establishment of common principles of restorative justice

9. Restorative justice is a concept that recognizes that a crime often affects not only the futures of victims and communities, but also those of the offenders involved. It seeks to restore all of the interests of all of the parties affected by a crime, to the extent possible using the active and voluntary involvement of the offenders, the victims and the communities. The term "restorative justice" itself was not defined in either of Economic and Social Council resolutions 1996/26 or 2000/14, but the Philippines did propose the following definition in its reply:

> "Restorative justice is an alternative measure in the criminal justice system that is not punitive in nature but rather seeks to render justice to offenders and victims alike, instead of tilting the balance heavily in favour of one of the stakeholders to the disadvantage of another. It seeks to re-establish social relationships that are the end point of restorative justice and seeks to address the wrongs in the doing and the suffering of a wrong that is also the goal of corrective justice."

10. The Friends World Committee for Consultation also provided a definition:

> "Restorative justice seeks to balance the concerns of the victim and the community with the need to reintegrate the offender into society. It seeks to assist the recovery of the victim and to enable all parties with a stake in the justice process to participate fruitfully in it."

11. The United States expressed the view that restorative justice had the potential to achieve multiple goals of ensuring the accountability of the offender, promoting restoration of the victim and benefiting the criminal justice system and community as a whole by involving all parties in the search for solutions that promote repair, reconciliation and reassurance. The United States also suggested that the practical application of restorative justice should be based on a shared set of principles and values. Reference was also made to the above-mentioned teleconference on restorative justice sponsored by the National Institutes of Correction (see para. 6), at which the following seven basic principles of restorative justice were recommended: (a) crime is an offence against human relationships; (b) victims and the community are central to justice processes; (c) the first priority of justice processes is to assist victims; (d) the second priority is to restore the community, to the degree possible; (e) the offender has personal responsibility to the victims and to the community for crimes committed; (f) the offender will develop improved competency and understanding as a result of the restorative justice experience; and (g) stakeholders share responsibilities for restorative justice through partnerships for action.

12. Many respondents (Argentina, Belgium, Bolivia, Mexico, Pakistan, Peru, Sierra Leone, South Africa and Turkey) shared the view that traditional criminal justice systems did not always provide the best possible outcomes in resolving conflicts among victims, offenders and communities. It was recognized that under current systems, victims, who suffered most from the crime, tended to remain unsupported, without receiving expeditious and appropriate remedies. Belgium, Sierra Leone and South Africa in particular noted a phrase contained in Economic and Social Council resolution 1999/26 that "traditional criminal justice mechanisms do not always provide an appropriate and timely response to those phenomena ...

restorative justice measures can lead to satisfaction for victims as well as to the prevention of future illicit behaviour and can produce viable alternatives to short terms of imprisonment and fines". One function of restorative justice is to provide a mechanism that can compensate for the defects in existing systems.

13. Argentina mentioned several merits of restorative justice. It tended to resolve conflict between victims and offenders in a non-adversarial manner, while preserving the option to revert to traditional judicial proceedings if those involved could not agree on restorative measures. It also made offenders confront their own actions and the consequences of those actions. Canada pointed out that restorative justice offered significant potential in collective efforts to reduce levels of conflict, promote healing and contribute to more peaceful and safer communities. Mexico was of the view that the use of restorative justice was a viable means of preventing conflicts, such as minor offences, family problems, school and community problems and problems involving youth, that might otherwise escalate to higher levels of confrontation and violence. Mexico also indicated that restorative justice would eliminate the disadvantages associated with deprivation of liberty for minor offences, thus reducing costs of imprisonment, and Pakistan and Qatar pointed to its potential to reduce prison overcrowding. Peru mentioned that basic trends in criminal law had been towards establishing guarantees for the offender, limiting the use of custodial sentences and taking preventive measures to protect other legal interests, but that the interests of victims had been neglected. Restorative justice measures tended to place victims on a more equal footing with offenders, restoring the balance.

14. A number of States reported that they had already implemented restorative justice measures in their criminal justice systems. Specific measures mentioned included mediation, probation, suspension of sentence, community service orders and restitution payments to victims.

15. In Germany, restorative justice measures were applicable to minor criminal offences. The public prosecution office and the courts were able to terminate criminal proceedings where the offender had made appropriate efforts to make reparation for the damage. In addition, the State was obliged to pay compensation to the victims of violent acts committed with intent. In Kuwait, the Criminal Procedure and Trial Law 17/1960 provided for reconciliation measures for sentences involving infringement of the inviolability of property, acts of wilful destruction of property, damage to property and threat of blackmail. In Malaysia, courts could release first-time offenders on probation for good conduct.

16. Oman applied Islamic law, which allowed amicable settlement of domestic conflicts. Muslim jurists approved settlements between the victim and the offender concerning bodily injury and Islamic law permitted the approval of such settlements even in serious offences such as murder. Qatar applied restorative justice measures in cases where this would not be prejudicial to the safety or security of society. Article 51 of the Penal Code of Qatar allowed for pardon and forgiveness for offences that did not affect the dignity, reputation or interests of the victim, while granting the victim the option of waiving or proceeding with the normal criminal process. In Peru, conciliation was possible in court proceedings relating to offences against honour and cases of injury caused by negligence. The Public Prosecutor's Office could decide not to prosecute in such cases if there was a voluntary offer of compensation by the offender or if the offence was a minor one, provided the victim agreed to civil compensation. In Peru, out-of-court settlements could be agreed upon by a conciliation centre or a qualified judge in accordance with Law No. 26872, article 5. In South Africa, a number of restorative justice initiatives had been taken as a result of the work of the Truth and Reconciliation Commission.

17. Many States had paid particular attention to implementing restorative justice measures in their juvenile justice systems. In Australia, "diversionary conferencing" had been tested since the early 1990s in every state and territory and in some states it was becoming established as a mainstream element of juvenile justice proceedings. In Germany, mediation was also applied to offences involving young people. In Malaysia, a juvenile offender could be released to his parent or guardian or be placed under a probation order pursuant to the Juvenile Courts Act of 1947. The South African Law Commission published a report in July 2000 presenting a draft bill on juvenile justice that had restorative justice as its central guiding principle. The Government of South Africa had also implemented a pilot project on family group conferences for child

offenders during 1996-1997. In Sweden, a one-person committee had been appointed to inquire into and analyse the role of mediation for young offenders in the legal system and to consider possible legislation on the matter. In the United Kingdom, recent youth justice reforms in England and Wales had incorporated restorative principles: the Youth Justice and Criminal Evidence Act of 1999 introduced referral orders under which a court could refer appropriate cases to youth offender panels. Those panels operated as community conferences, involving, where possible, community volunteers and victims. Restorative justice measures were also applied in some elements of the juvenile justice systems in Scotland and Northern Ireland.

18. Several States drew attention to relatively recent legislative measures that incorporated restorative justice measures. In Belarus, new substantive and procedural criminal legislation, which entered into force on 1 January 2001, contained restorative justice elements. Under that legislation, in "private charge cases", proceedings could be initiated by the victim, his or her legal representative or the representative of a juridical person. Once commenced, such proceedings could later be suspended if the parties so agreed. Ecuador had also recently amended its criminal law to provide alternative punishments, in particular for minor offences. Italy had reinforced the role of restorative schemes in criminal cases. Bolivia had established a new Code of Criminal Procedure, Law No. 1970, article 18 of which prescribed that private criminal actions would be brought exclusively by the victim of the offence.

19. Pilot projects on restorative justice are being implemented in a number of States. In 1997, Denmark initiated an extended pilot scheme of victim/offender mediation to supplement traditional criminal prosecution, which would continue until the summer of 2002. Norway instituted a new mechanism called "*konfliktråd*", which provided a form of arbitration between the victim and the offender. In New Zealand, funding has been provided for some 12 community-managed restorative justice programmes and 3 court-based restorative justice pilot projects. In Pakistan, the Government was introducing measures to settle minor disputes outside its formal criminal justice system under its devolution and judicial reform plans.

20. In addition, many States had conducted discussions and studies on restorative justice. In Bulgaria, there was public debate based on Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe to Member States Concerning Mediation in Penal Matters. In Norway, a comprehensive study on the protection of and support for victims of crime was presented in 1992[3] and subsequently became the basis for a number of amendments to Norwegian legislation to strengthen the position of victims. In South Africa, the South African Law Commission published a number of publications relating to restorative justice. A study on restorative justice was conducted in Turkey.

21. Notwithstanding those developments, most respondents recognized that the application of restorative justice measures was still at an exploratory stage and that more information on their application and operation was needed. It was therefore considered worthwhile to discuss the matter during the eleventh session of the Commission, to exchange views and experiences and to develop common principles of restorative justice.

22. Some replies did raise cautions or concerns about the use of restorative justice measures and mentioned the need to ensure that measures applied were appropriate for the circumstances of cases where they were used. The joint reply submitted by the American Correctional Association, the International Community Corrections Association and Prison Fellowship International introduced a 2000 study issued by the International Scientific and Professional Advisory Council, entitled "An overview of restorative justice programmes and issues", drafted by Paul Friday of the World Society of Victimology, which set out some of the issues which the International Scientific and Professional Advisory Council felt should be addressed. In some cases, it was possible that restorative justice programmes could ultimately create processes so similar to those of adversarial courts that they undermined rather than supported restoration of the interests involved. In other cases, the legal basis of criminal procedure could become obscured. More fundamentally, it was noted that restorative justice measures, being applied on a case-by-case basis, generally failed to address the underlying aetiological factors associated with crime, such as poverty, racism and cultural and social values. The conclusions of the study stressed the need to develop guidelines for

applying restorative justice measures to address those concerns.

B. Comments on the advisability of developing an instrument on restorative justice

23. Most of the respondents expressed support for the idea of developing an international instrument and of those which addressed the issue, only Japan voiced specific concerns. Most also considered the proposed preliminary draft elements a good basis for discussion and expressed their willingness to support such discussions. In Japan's view, it would be more realistic to develop and apply restorative measures in the context of the variations of national criminal justice systems than to try to achieve international standardization through an instrument. In its opinion, the issues, such as how damage caused by crimes should be redressed and how victims of crimes should be reintegrated into society, were closely related to each country's criminal justice system and might vary from country to country. Japan also noted that, to some extent, restorative justice elements had already been incorporated into national systems on that basis.

24. Regarding the nature of the instrument, the United States considered it important that the new instrument be written in such a way as to encourage the adoption of the general principles and values upon which restorative justice was based, rather than focusing on one particular form of restorative justice. Japan, New Zealand and Sweden were of the view that any instrument should be non-binding. Sweden also stressed that restorative justice programmes should not interfere with States' rights to impose sanctions on criminals and underlined that restorative justice programmes should not interfere with the principles of penal law regarding proportionality, legality, equity, predictability and consistency in sentencing. Ecuador considered that when restorative justice measures were applied in criminal procedures, effective proportionality between the gravity of the offence and a corresponding punitive measure should always be borne in mind. The United Kingdom and the United States considered that restorative justice should be seen as a supplement to traditional criminal justice systems and not as an alternative to them. This contrasted with the view of the organization Defence for Children International, which took the view that common principles should clearly point out that this was a process and not a programme: that the process was a clear and distinctive alternative to the formal criminal and juvenile justice judicial process. Fiji and Ireland mentioned that the establishment of common principles should take into account different situations and views and Ireland specifically made reference to the differing views of the European Union and the Council of Europe. Ireland also mentioned that common principles should be coordinated with related regional initiatives.

25. With regard to the scope of application of restorative justice programmes, Kuwait stated that its law on reconciliation established restrictions on application, intended to prevent the reconciliation from being exploited as a subterfuge for criminals to elude punishment, to preserve the rights of the victim and society and to ensure adequate deterrence. Peru considered that restorative justice should only be applied to injury caused by negligence and to minor offences, subject to fundamental due process or procedural fairness.

26. Bolivia, Canada and Peru stressed that key elements in determining whether restorative justice should be used in particular cases were the need to ensure that everyone who participated did so voluntarily, sensitivity to possible imbalances of power between victims and offenders and issues relating to the safety or security of participants. Bolivia also mentioned that agreements or other outcomes should be reached by the parties voluntarily and should contain only reasonable and proportional obligations. The United States also underlined that it was important that victims be allowed to choose whether to participate, to determine the extent of their participation and to choose the point at which they would cease to participate. Concerning the balance of power between victims and offenders, Fiji and Mexico emphasized that programmes established in multilingual societies should provide for the right to have documents translated and proceedings interpreted into appropriate languages.

27. In connection with the operation of programmes, Argentina pointed out that mediation was often a viable alternation or additional means of resolving cases and, where it was tried without success, it was still possible to revert back to more conventional judicial proceedings. Argentina also considered that

confidentiality was an essential element in implementing restorative justice measures. In relation to that point, Germany stressed that legislation on restorative justice should contain a data protection provision, which would restrict the use of communicated and collected data solely for use in mediation.

28. Ireland, Sweden, the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders and Defence for Children International all emphasized that the process and outcomes of restorative justice programmes should be monitored, assessed and evaluated for use in the further development of such programmes.

29. Some respondents referred to existing international instruments that contained elements relating to restorative justice, such as the United Nations Convention against Transnational Organized Crime and its Protocols (General Assembly resolutions 55/25, annexes I-III, and 55/255, annex), the Convention on the Rights of the Child (resolution 44/25, annex), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (resolution 40/33, annex) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (resolution 45/112, annex), and suggested that they should be taken into account when developing any new instrument on restorative justice.

C. Specific comments on the preliminary draft elements of a declaration of basic principles on the use of restorative justice in criminal matters

30. Comments received included the specific notes below on the draft elements annexed to Economic and Social Council resolution 2000/14.

1. General comments

31. Costa Rica indicated that the draft elements should include the principle of non-discrimination and impartial application in order to avoid differences based on race, colour, sex, language, religion, political views or any other distinction based on national or social origin, wealth, birth or any other status. It also suggested that the Spanish text should use "*justicia restaurativa*" rather than "*justicia restitutiva*".

32. Mexico was of the view that the text of the preliminary draft elements was too vague and suggested that it should contain a list of mediation and restorative justice measures. It also suggested that a list of minor offences or criteria for identifying and distinguishing them would be useful.

33. Norway proposed that the draft elements include principles for reparation to victims similar to those found in article 75 of the Rome Statute of the International Criminal Court.[4] It also suggested the establishment of a trust fund similar to that provided for in article 79 of the Rome Statute.

34. The Philippines suggested that the scope of application of restorative justice programmes should be more clearly delineated.

35. The United States noted that there was no single form that restorative justice must take in order to be successful and considered the use of the term "programme" too narrow. It suggested that, where a broad reference was needed, the terms "restorative-based programme", "restorative-based process" and/or "restorative justice alternative(s)" should be used to cover the full range of possibilities.

2. Comments on the definitions

36. Mexico proposed that the word "restorative" in paragraph 1 should be defined and the Philippines suggested that the term "restorative justice" should be defined. Mexico indicated that the words "any other programme" in paragraph 2 were too vague. Japan proposed that the words "often with the help" in paragraph 3 be replaced with the words "where necessary with the help". The Philippines suggested replacement of the word "encounter" in paragraph 5 with the words "restorative justice".

3. Comments on the use of restorative justice programmes

37. Commenting on paragraph 6, Mexico noted that establishing restorative justice programmes at all stages of the justice process could minimize their significance and impact. It also expressed concern about the possibility of two parallel sets of proceedings arising out of the same facts. New Zealand also disagreed with the proposition that restorative justice should be available at all stages of the criminal justice programme. Slovakia suggested that restorative justice

programmes should focus on cases involving minor offences, offences for which national law required the consent or participation of the victim to prosecute and/or offences committed by juveniles that were not too serious to warrant the use of restorative justice.

38. Commenting on paragraphs 6 and 7, the Office of the Prosecutor for the International Tribunal for the Former Yugoslavia noted that those paragraphs could not be applied unless national bodies first chose not to exercise their discretion to prosecute. Fiji and Turkey questioned the requirement of voluntariness, suggesting that the judicial process should either encourage or even compel parties to seek restorative processes in cases where "free and voluntary consent" did not exist. The United States took a different view, arguing that victims should have the right to refuse consent to participate at the outset, as well as the right to withdraw consent and revert to conventional procedures at any time during the process. The Philippines sought greater clarity about the status of elements of the process as "restorative" or not, so that it would be possible to establish when restorative processes began and ended in a particular case.

39. Japan proposed replacing the word "participation" in paragraph 8 with "participation itself" and Slovakia suggested replacing the word "acknowledge" with "know". Mexico had concerns about the policy underlying the second sentence. In its view, the participation of an alleged offender in a restorative process should be admissible as evidence of guilt in any subsequent prosecution. Commenting on paragraph 9, Fiji observed that the underlying philosophy for the parties should be that the use of restorative processes in most cases would represent a "win-win" option, making it attractive to both victims and offenders in most cases.

40. Commenting on paragraph 10, several countries had concerns about possible interaction between restorative and conventional procedures in individual cases: Fiji noted that the courts must remain the final arbiter of the type of sanction and rehabilitation measure to be imposed against the offenders; Germany called for greater clarity with respect to the nature of responsibilities for criminal justice officials; and Slovakia proposed deletion, noting that such discussions conflicted with the neutrality of the officials involved. Mexico noted that, where the offender did not take responsibility, judges should still be in a position to order the payment of compensation.

41. South Africa proposed the addition of the following new text after paragraph 10:

> "10 bis. Formal legal authorities, especially courts, should encourage parties where appropriate to resort to restorative justice measures to resolve their disputes.
>
> "10 ter. Authorities should provide programmes that engender social responsibility in young offenders and prevent recidivism."

4. Comments on the operation of restorative justice programmes

42. Several countries proposed changes to address concerns about elements they saw as missing from the draft text in this segment. The Philippines sought added and expanded references to the use of facilitators and administrators and Slovakia felt that provision should be made to ensure that resources were available for the fees and costs associated with mediation, such as those of facilitators, interpretation and translation services. Ukraine saw a need for basic safeguards and proposed including provisions parallel to those in paragraphs 6-8 in this segment. The United States proposed the title "Implementation of restorative justice principles/concepts" and suggested that the section should be written with the goal of encouraging adoption of the values on which restorative justice was based, rather than simply focusing on operational guidelines.

43. Commenting on specific provisions, Fiji noted that the guidelines and standards referred to in paragraph 11 should be required to be prescribed by law or regulation. Japan sought the deletion of the word "fundamental" from the chapeau of paragraph 12 and suggested replacement of the words "should be applied to" with the words "should be fully considered in". Regarding the right to legal advice, there were concerns that the language should protect the right to obtain advice, but not be seen as creating any right to the actual provision of legal counsel or services. Japan sought language excluding any right to appointed counsel and New Zealand pointed out that in many cases full information about the case, as opposed to legal advice, might be sufficient. Mexico felt that the right to legal advice should arise during proceedings as

well as before and after proceedings and Japan and New Zealand pointed out that access to a parent or guardian should be included in the case of a minor accused of a crime, with Japan suggesting that this apply only "where appropriate". Regarding paragraph 13, two countries expressed concerns about the confidentiality of restorative processes and sought limits or exceptions to the proposed principle. Japan sought an exception in cases where the "interest of justice" required disclosure and Mexico argued that discussions should be subject to disclosure in any subsequent criminal proceedings in cases where the restorative process was not successful. Japan proposed the deletion of paragraph 14 and Germany argued that the term "judicial discharges" should be clarified.

44. Regarding paragraphs 15 and 16, most countries (e.g. Fiji) supported the principle that where restorative processes did not bring about a satisfactory outcome, more conventional or established criminal procedures should be resorted to. Costa Rica sought language clarifying that the normal procedural requirements and safeguards would apply in such cases. Japan proposed the wording "Where restorative process is substituted for the criminal proceeding and no agreement can be made ...", as well as deletion of the second sentence of each of paragraphs 15 and 16, so that the lack of agreement in a restorative process could in fact be used as the basis for a more severe criminal sentence. Fiji proposed modification of paragraph 16 to make direct reference to the use of penal sanctions for any party failing to implement an agreement. Japan proposed the language "Where a restorative process is substituted for a criminal proceeding and the offender fails to implement an agreement made in the course of restorative process ...". Mexico sought greater clarity with respect to action to be taken in the case of non-compliance, arguing for pre-established rules for dealing with such cases. Ukraine suggested broadening the language to include cases of other infringements, such as the coercion of a party to take part in a restorative process in the language, and proposed insertion of the words "or the violation of other principles of restorative justice" after the words "a restorative process".

5. Comments on provisions dealing with facilitators

45. Mexico expressed several concerns about facilitators, calling for greater certainty with respect to qualifications and functions. It suggested that experts in criminal law should be included as facilitators, that decisions of facilitators should require a legal basis and that a detailed knowledge of the system should be required to ensure that victims were advised of all their options.

IV. Conclusion

46. Most of the countries that provided written comments on the preliminary draft elements supported the idea of promoting restorative justice measures in criminal justice systems. Restorative justice would serve as a supplement to established criminal justice practices, especially in areas where such practices had not functioned adequately. Many States had already incorporated some restorative justice measures into their criminal justice systems, but they still considered that the application of restorative justice measures was at an exploratory stage and there were further possibilities to be explored and developed. Thus, most of the countries responding welcomed the opportunity to exchange views and information and supported the holding of a meeting of experts on the subject. The establishment of an international instrument on restorative justice, such as the preliminary draft elements, was also considered beneficial for States as a guideline for the application of restorative justice measures.

47. However, not all respondents were in support of the development of an international instrument and some were cautious about its application and operation. Many respondents provided various comments on the preliminary draft elements. While there were many common elements, each country had its own criminal justice system based on its culture, customs and social structures. Restorative justice offered promising concepts and options if taken as a supplement to established criminal justice practices, but these must be taken in the context of established national practices and the social, cultural, economic and other circumstances in which they were developed. When an international instrument was developed, it should take into account such factors. A normative instrument setting non-binding guidelines was seen as more practical and feasible. The Commission on Crime Prevention and Criminal Justice may wish to consider these points when it develops common principles on

the use of restorative justice during its eleventh session.

48. Both the participants in the meeting of the Group of Experts and the majority of those responding to the note verbale expressed the view that restorative justice in general should serve as a complement to established justice systems and practices and that it should not be seen or understood as an effort to replace existing systems. It was also clear, however, that specific restorative processes or outcomes did, in some cases, effectively replace individual elements of established systems. For example, following some preliminary determination that such a replacement was appropriate having regard to the nature of the case involved, mediation could replace some or all elements of a conventional trial and restorative outcomes sometimes replaced conventional sentences in appropriate cases. In its discussions and in its report, the Group of Experts referred to restorative justice as "complementing" established criminal justice, while referring only to the use of restorative justice as a "replacement" in the context of specific criminal justice practices that may be replaced by restorative ones. It should be understood that restorative justice is not intended as a replacement for criminal justice per se and members of the Group of Experts did not want references to "replacement" interpreted more broadly than intended.

Notes

[1] See *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000: report prepared by the Secretariat* (United Nations publication, Sales No. E.00.IV.8).

[2] *Official Records of the Economic and Social Council, 2001, Supplement No. 10* (E/CN.15/2001/30/Rev.1), part two, chap. I, sect. A, draft resolution II, annex, sect. XV.

[3] Norwegian official document, NOU 1992:15.

[4] A/CONF.183/9.

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United Nations standards and norms in crime prevention and criminal justice

Restorative justice

Report of the Secretary-General

Corrigendum

The items of the provisional agenda should read as above.

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Restorative justice

Report of the Secretary-General

Addendum

Report of the meeting of the Group of Experts on Restorative Justice

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I. Introduction

1. The present report is submitted to the Commission on Crime Prevention and Criminal Justice in accordance with Economic and Social Council resolutions 1999/26 of 28 July 1999 and 2000/14 of 27 July 2000.

2. In its resolution 2000/14, the Economic and Social Council requested the Secretary-General to seek comments from Member States and relevant intergovernmental and non-governmental organizations, as well as the institutes of the United Nations Crime Prevention and Criminal Justice Programme network, on the desirability and the means of establishing common principles on the use of restorative justice programmes in criminal matters, including the advisability of developing an instrument for that purpose, such as the preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters annexed to the resolution.

3. The Council also requested the Secretary-General to convene, subject to the availability of voluntary contributions, a meeting of experts selected on the basis of equitable geographical representation to review the comments received and to examine proposals for further action in relation to restorative justice.

II. Conclusions and recommendations

4. The members of the Group of Experts on Restorative Justice supported the idea of promoting restorative justice measures in criminal justice systems for the same reasons as had most of the States that had provided written comments on the preliminary draft elements. Restorative justice would serve as a supplement to established criminal justice practices, especially in areas where such practices had not functioned adequately. The Group of Experts noted that many States had already incorporated some restorative justice measures into their criminal justice systems, but they still considered the application of such measures to be at an exploratory stage. The Group of Experts was of the view that there were still further possibilities to be expanded and developed. It agreed that the establishment of an international instrument on restorative justice, such as the preliminary draft elements, would be beneficial for States as a guideline for the application of restorative justice measures. It also noted that not all respondents were supportive to the establishment of such an instrument, however, and expressed the view that restorative justice concepts and options should be taken as a supplement to established criminal justice practices, as well as in the context of established national practices and the social, cultural, economic and other circumstances in which they were developed. When an international instrument was developed, it should take the form of a normative instrument: setting non-binding guidelines was seen as more practical and feasible than attempting to establish more mandatory or prescriptive ones, given the nature of the subject matter.

5. The Group of Experts recognized the wide range of restorative justice options being applied in Member States, its evolving nature and the importance of research and information exchange. It therefore recommended that:

(a) Research be conducted and information collected and disseminated among Member States, the institutes of the United Nations Crime Prevention and Criminal Justice Programme network and, where appropriate, among other international, regional and non-governmental organizations;

(b) The basic principles annexed to the present report be periodically reviewed to take account of new developments;

(c) Member States that had adopted restorative justice practices make information about those practices available to other States upon request;

(d) Member States assist one another in the development and implementation of research, training or other programmes, as well as activities to stimulate discussion and the exchange of experiences on restorative justice;

(e) Member States consider the provision of technical assistance to developing countries and countries with economies in transition, on request, to assist them in the development of restorative justice programmes;

(f) Member States consider making voluntary contributions for the support of the provision of such technical assistance.

6. The Group of Experts also recommended that, after consideration and approval by the Commission on Crime Prevention and Criminal Justice and other United Nations policy-making bodies, the revised draft basic principles (annex I) be given the widest possible dissemination among Member States, as well as relevant intergovernmental and non-governmental organizations.

III. Organization of the meeting

7. Pursuant to Economic and Social Council resolution 2000/14, the meeting of the Group of Experts on Restorative Justice was held in Ottawa from 29 October to 1 November 2001. The meeting was hosted by the Government of Canada. The Commission Secretariat and Legal Affairs Branch of the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention of the Secretariat served as the secretariat for the meeting.

8. The Group of Experts reviewed the comments received from 37 Member States on the preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters (see the report of the Secretary-General on restorative justice (E/CN.15/2002/5 and Corr.1)) and examined proposals for further action. It also considered the question of whether an international instrument in some form was desirable. There was general agreement that an instrument was desirable and it was noted that all but one of the written comments received had taken a similar view. The experts also shared the view expressed by most of the Member States responding that an instrument on restorative justice was needed to provide guidance in the establishment of national programmes, but that it should not be of a legally binding nature. The experts agreed that restorative justice measures should be flexible in their adaptation to established criminal justice practices.

9. The Group of Experts also conducted a careful review of the preliminary draft elements and proposed a number of amendments, together with a preamble in order to better explain the concept of "restorative justice" to Governments and officials not already familiar with it (see annex I for the text as revised by the Group of Experts).

A. Opening of the meeting

10. The meeting was opened by Stephen Owen, Parliamentary Secretary to the Minister of Justice of Canada. Mr. Owen outlined the experiences of Canada with restorative options, in particular in the context of initiatives that had been taken in the area of aboriginal justice programmes. He compared those initiatives with similar measures taken in other countries. Restorative processes such as the use of traditional means of conflict resolution were often suitable in such environments, both because they took into account the specific cultures and needs of the people involved and because they could often be implemented by the people themselves at the local level, creating effective programmes with limited financial and professional resources. Mr. Owen also expressed the view that it was important to bear in mind that restorative justice options were not suitable in every case. Cases often arose in which the situations of those involved prior to the offence were such that restoring them was not a desirable outcome. Such cases had led to further initiatives referred to as "transformative justice", which sought to achieve outcomes consistent with the current interests and needs of the parties rather than simply restoring the status quo ante. It was also important to bear in mind that, while restorative justice methods were often economical and cost-effective, cost factors should not be allowed to lead to their use in areas or cases for which they were not suitable.

11. The representative of the Centre for International Crime Prevention stated that, apart from the mandate given by the Economic and Social Council, discussions of restorative justice were important as a means of reconsidering the fundamental premises underlying criminal justice. That included not only the means whereby criminal justice sought to achieve its goals, but also the formulation of those goals themselves, including a re-examination of the basic roles of offenders, victims and conventional criminal justice systems, as well as the relationships between them.

B. Attendance

12. The meeting was attended by 17 experts from 16 different countries, as well as by 9 observers (see annex II).

C. Election of officers

13. The following officers of the meeting were elected by acclamation:

Chairman:	David Daubney (Canada)
Vice-Chairpersons:	Manuel Alvarez (Peru)
	Jabu Sishuba (South Africa)
	Galina Toneva-Dacheva (Bulgaria)
Rapporteur:	Kittipong Kittayarak (Thailand)

D. Adoption of the agenda

14. The Group of Experts adopted the following agenda:

1. Opening of the meeting.
2. Election of officers.
3. Adoption of the agenda and organization of work.
4. Discussion of the concept of restorative justice and its role in criminal justice systems.
5. The desirability of establishing common principles for restorative justice.
6. Discussion of preliminary draft elements of a declaration of basic principles.
7. Discussion and adoption of the report of the meeting.
8. Closing of the meeting.

IV. Discussion of the concept of restorative justice and its role in criminal justice systems

15. It was noted that it was difficult to determine a specific time or place of origin for restorative justice. Traditional and indigenous forms of justice fundamentally viewed crime as harm to people and justice as restoring social harmony by helping victims, offenders and communities to heal. Restorative approaches were prominent in the legal codes of civilizations that were the foundation of modern legal systems. Restorative elements had been present in all of the world's major legal systems for decades and, in some cases, centuries. In recent years, there had been a reassessment of the relationships between offenders, victims and the State in criminal cases and it was from that reassessment that much of the contemporary consideration of restorative justice had arisen. Some of the discussion originated with experts who participated in or comment on criminal proceedings on a professional basis, but much of it also came from victims, witnesses and offenders, whose contact with criminal justice was involuntary, and from the general public, who questioned conventional approaches to criminal justice on both moral and utilitarian grounds. One important characteristic of modern restorative justice programmes was that they avoided imbalances that favoured some stakeholders over others.

16. It was stated that, in practice, elements of restorative justice might vary significantly, depending on the principles and underlying philosophies of the national criminal justice systems in which they were applied. At a more fundamental level, however, the philosophy and basic principles had many common factors. Those basic principles and the practical applications that flowed from them were in place or under consideration in many national criminal justice systems. At the procedural level, there was a reconsideration of the status and roles played by victims, for example, calling into question the tendency of many criminal law systems to cast criminal prosecutions as an adversarial process between the State and the offender in which the victim had only the status, if any, of a witness. Substantively, outcomes that focused on retribution against the offender rather than on repairing the harm done had also been called into question.

17. The expert group examined models of restorative justice and the specific principles common to most restorative justice models in detail. One major benefit of restorative justice lay in its potential to pose important questions about how existing practices defined success and the extent to which they achieved it and to present options that might cause less harm and generate greater benefits for those involved. However, there were concerns that without some common understanding about basic principles, restorative justice might be misunderstood or might develop into

something that so closely resembled conventional criminal justice that it could no longer generate new ideas or approaches. To prevent that, it had been argued that the development of common principles was needed. There had also been concerns about the pressures placed on criminal justice systems and participants, which had been addressed by extensive safeguards in conventional systems, and other concerns about the need to ensure that restorative justice processes were protected by safeguards that guaranteed the same degree of protection, both for the participants and for the integrity of the process itself.

18. The Group of Experts was of the view that restorative justice principles lay at the foundation of existing criminal justice systems in most if not all parts of the world and it was apparent in the discussion that elements of modern restorative justice had been considered or implemented to some degree in all of the countries and regions. Generally, those were often seen as less costly and more effective than more conventional criminal justice options in many circumstances, as well as often being more sensitive to the needs of indigenous or aboriginal populations. One challenge identified was the need to implement new ideas while remaining within the overall context of the rule of law. Another challenge was ensuring that, in adjusting the balance of influence exercised by victims, offenders and the State to increase the role of victims, an appropriate balance was preserved in which the essential oversight of the process by the State was maintained.

19. There was general agreement among the experts that restorative justice practices should be seen as complementing established justice systems and not as a replacement for them. This raised a second challenge, that of finding ways to make appropriate determinations of whether conventional or restorative practices should be followed in each individual case. The experts also agreed that there was a need for flexibility in developing and implementing restorative justice policies. That included flexibility in adapting policies to the different laws, traditions and practices that existed in different countries, flexibility in applying restorative justice to each individual appropriate case and flexibility in adjusting existing restorative justice policies to take account of new developments that were expected to arise as restorative measures were implemented in different countries.

20. Daniel Van Ness briefed the experts on the history and fundamental elements of restorative justice, as well as on the degree to which it was in use in a range of countries, providing examples of actual cases. Examples included cases where restorative processes had been used instead of established justice practices, as well as cases where elements of both had been used in a complementary approach. Some cases involved restorative outcomes from conventional procedures; others involved the use of restorative practices to deal with some issues arising from a particular offence, leaving other practices to conventional procedures. Mr. Van Ness traced the history of the proposed basic principles on the use of restorative justice within the United Nations and outlined the reasons why many Member States felt that developing common principles on an international basis was important. It had been considered desirable to ensure consistency of approach and to assist States seeking to develop restorative justice ideas in a manner consistent with their existing justice systems. He clarified that the proposed basic principles were intended as general guidelines and not binding standards or rules and that, as restorative justice remained a new and developing area, any principles developed might require reconsideration or the addition of further principles as the subject matter evolved in practice.

21. In the discussion that followed Mr. Van Ness' presentation, a number of issues were raised. It was noted that legal systems periodically underwent fundamental changes to keep pace with the demands made on them and that restorative justice could be seen as such a development, although it was important that the rethinking of established practices should be seen as a process of reforming existing institutions rather than replacing them with new ones. The fundamental themes of restorative justice were described as including such elements as the empowerment of the individuals involved, including both victims and offenders; emphasis on healing; emphasis on the role of communities and consensual decision-making; and a change in the mindset of professionals in the established criminal justice system. The importance of balancing the interests of the key participants in cases was also noted. Restorative justice had developed in part as a response to the exclusion of victims and sought to redress this, but that should not go so far as to unduly reduce the role of the State in prosecuting offenders and maintaining oversight and essential

safeguards on the process. It was necessary to establish a viable balance between the influence of the State, offenders and victims, both in general and in the context of each individual case.

22. It was also noted that restorative justice did not purport to offer a complete or comprehensive response to crime. It was commonly accepted that many underlying social and economic factors contributed to crime and that policies and measures to address those factors were still important, both to prevent crime and to reduce its harmful effects on individuals and societies. Furthermore, restorative procedures must be carefully adapted if used in cases of very serious crimes, where repairing the harm was not always possible. In such cases, restorative procedures could be a useful complement to the established criminal justice system. Often, merely creating a frank record of what had occurred brought substantial psychological benefits for both offenders and victims. One example was the recent work of the Truth and Reconciliation Commission in South Africa.

23. While it was seen as desirable that both the offender and victim participate in restorative processes, there were cases in which asymmetrical practices based on restorative approaches might apply to one party if the other was not available or not willing to take part. In that context, the use of "surrogate" offenders and victims was discussed. Offenders might be allowed to have encounters with members of the community in lieu of specifically identified victims, for example. In cases where an offender was never caught, the use of surrogate offenders or other restorative measures could still be important as a way of responding to the harm suffered by victims. In all cases, it was seen as essential that those who participated did so voluntarily, but in some cases restorative responses might still be preferable to non-restorative options. It was important to treat each case individually and in an appropriate manner, bearing in mind that, whatever option might be applied, the common element was that justice should be done.

24. A key issue identified was the balance between restorative and conventional elements and the difficulty of determining which approach should be taken in individual cases. Generally, it was the view of experts that most systems should seek to apply restorative measures wherever possible, reserving conventional criminal justice options for cases where restorative methods were inappropriate or impracticable or where they were tried and did not prove successful. Most experts also expressed the view that restorative justice should not be seen as operating in parallel to conventional criminal justice measures, but as a complement to them. In some cases, individual restorative measures might apply, while in others entire cases could be dealt with in a restorative manner, but it was critical that restorative measures be seen as complementary to conventional ones and that careful decisions be made in each case as to whether they should be tried or not. Restorative justice should not become a parallel justice system, as elaborate, costly and complex as conventional criminal justice systems.

25. The experts also considered the development of fundamental principles on restorative justice as an important step at the international level, to assist countries in developing domestic practices and ensuring some degree of international consistency. Such principles should be formulated in a way that was meaningful and helpful in the context of the vast range of criminal justice traditions, laws and practices in operation in Member States. The development of standards that were too prescriptive or categorical was not seen as feasible. It was important to maintain sufficient flexibility not only to deal with a wide range of different cases, but also to permit restorative justice to continue to provide a role as a flexible and innovative alternative to established criminal justice practices. The need for an ongoing process that could keep pace with new developments in a still evolving field was also noted.

26. Developing theories as a backdrop against which restorative justice practices could be conceptualized was seen as important, but it was also noted that, in most cases, restorative justice practices had developed first, based on individual innovation or traditional practices, and that the underlying theories were being developed based on practices previously developed at the operational level. There was a need for efforts to define, describe or explain restorative justice in order to assist countries that were not familiar with the concept in developing practices useful to them. It was also noted that there were other innovative models in various countries, such as transformative justice and community justice, and that individual elements of those models might overlap with restorative justice in some cases. In that context, principles on restorative

justice should be formulated so as to allow continuing development of those related initiatives.

V. Consideration of the desirability of an international instrument

27. The Chairman reviewed the written responses of Member States on the question of a new instrument, noting that only one of the responding States had expressed serious reservations (see E/CN.15/2002/5 and Corr.1, para. 23). Several other States had expressed support for an instrument provided that it was not binding, a position that was consistent with the views expressed by many experts during the preliminary discussion. It was suggested that that was also implicit in the text of Economic and Social Council resolution 2000/14, which called for the consideration of basic principles rather than a binding international instrument. It was also noted that at its tenth session the Commission on Crime Prevention and Criminal Justice had completed the drafting of plans of action for implementing the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, adopted by the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,[1] which included a plan of action on restorative justice.[2] After brief discussion, the experts were in agreement that an international instrument should be developed, provided that elements such as the need for flexibility and complementarity with established criminal justice practices were taken into account.

VI. Consideration of the basic principles on the use of restorative justice programmes in criminal matters

28. As a preliminary matter, the Chairman addressed the question of defining the term "restorative justice", reminding the experts of the need to avoid overly prescriptive language and the possibility of incorporating general language into an explanatory preamble. There was discussion of a number of specific definitive elements and a range of views were expressed about the level of detail that should be reflected. It was seen as important to have clear definitions and explanations of the concepts of restorative justice in order to bring them to the attention of those countries not already pursuing or implementing restorative justice policies. However, experts were aware of the fact that, while the core philosophies of restorative justice were widely accepted, there would not be universal consensus on every element or aspect in every Member State. It was noted that the purpose of the basic principles was to inform and encourage Member States to adopt and standardize restorative justice measures in the context of their legal systems, but that there was no intention to make them mandatory or prescriptive.

29. Experts were also aware that the theories of restorative justice were still evolving and they were concerned that overly prescriptive or narrow definitions might impede further evolutions along those lines. It was also understood that some elements of restorative justice represented a significant change for some Member States and that time would be needed to understand and adapt them to each national criminal justice system. It was therefore decided to develop a preamble in order to better explain the concept of restorative justice to those not already familiar with it.

30. The Group of Experts reviewed the texts of the proposed elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters.

31. There was discussion of the meaning of the term "offender", which had legal significance in some countries, but was not defined in the basic principles. The experts decided that it was not necessary to define the term "offender" and that it would be undesirable to attempt to define the terms "victim" or "community". There were some concerns, however, that, in the legal systems of some countries, the meaning of "offender" was limited to those actually convicted or found guilty of offences. The experts agreed that the intended meaning in the basic principles was broader, including those charged with, accused of or alleged to have committed offences, depending on the circumstances of each case.

32. In the discussion of the term "facilitator", the Group of Experts also noted that references to "person" and "facilitator" should not be limited to those appointed to or authorized by the State. Facilitators could also be individuals who were properly trained, but who were not necessarily employed by or affiliated

with the State. It was also noted that, in appropriate cases, mediation, conciliation or facilitation could be carried out by groups, such as sentencing circles.

33. It was further noted that references to "criminal justice process" or "criminal justice systems" should be interpreted broadly. The intention was to include a full range of cases, which might arise at any time after the commission of an offence, but before or after conviction, after sentencing or even after the completion of a sentence. It was noted that, in some legal systems, safeguards would prevent the use of restorative alternatives at specific stages in order to protect the integrity of the legal process.

34. There was discussion of the meaning of the reference in paragraph 12 (c) of the basic principles to not using coercion or inducement by unfair means in order to obtain the participation of a victim or offender in a restorative process. The Group of Experts was aware of the fact that in most cases offenders faced the alternative of prosecution and punishment if they did not participate and was of the view that, in that context, the word "coerced" should be interpreted as referring only to extra-legal or improper coercion and not to influences deriving from the possibility of prosecution, punishment or other legal proceedings.

35. In discussing principles for the use of restorative justice programmes, there was extensive discussion of how to deal with cases where various forms of inequality between the parties involved might make the use of restorative programmes inappropriate. Examples where that might occur included cases of domestic or family violence, where the victim might be at a disadvantage with respect to the offender or other family members, or cases of small communities, where pressures might be exerted on one or more of the parties involved by the community itself. In formulating language on the issue, the experts also sought to avoid listing the various factors on which power imbalances could be based. It was decided to limit the text to a reference to "disparities leading to power imbalances, as well as cultural differences among the parties", with the understanding that disparities could include, inter alia, age, intellectual capacity, gender or racial, ethnic or cultural factors, any of which might place one of the parties at an undue disadvantage during restorative processes undertaken in the context of a particular cultural or procedural situation.

Notes

[1] See *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000: report prepared by the Secretariat* (United Nations publication, Sales No. E.00.IV.8).

[2] *Official Records of the Economic and Social Council, 2001, Supplement No. 10* (E/CN.15/2001/30/Rev.1), part two, chap. I, sect. A, draft resolution II, annex, sect. XV.

Annex I

Revised draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters*

Preamble

The Group of Experts on Restorative Justice,

Recalling that there has been a significant increase worldwide in restorative justice initiatives,

Recognizing that those initiatives often draw from traditional and indigenous forms of justice that fundamentally view crime as harm to people,

Emphasizing that restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through the healing of victims, offenders and communities,

Stressing that this approach enables those affected by crime to share their feelings and experiences openly, and aims at addressing their needs,

Aware that this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure, allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime,

Noting that restorative justice gives rise to a range of measures that are flexible in their adaptation to established criminal justice systems and complement those systems, taking into account legal, social and cultural circumstances,

Recognizing that the use of restorative justice does not prejudice the right of States to prosecute alleged offenders,

Recommends that the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, annexed to the present resolution, be established to guide the development and operation of restorative justice programmes in Member States.

Annex

Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

I. *Use of terms*

1. "Restorative justice programme" means any programme that uses restorative processes and seeks to achieve restorative outcomes.

* Economic and Social Council resolution 2000/14, annex, as amended by the Group of Experts on Restorative Justice.

2. "Restorative process" means any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

3. "Restorative outcome" means an agreement reached as a result of a restorative process. Restorative outcomes may include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

4. "Parties" means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.

5. "Facilitator" means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.

II. *Use of restorative justice programmes*

6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.

7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and contain only reasonable and proportionate obligations.

8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to and in conducting a restorative process.

10. The safety of the parties should be considered in referring any case to and in conducting a restorative process.

11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities and support the reintegration of the victim and the offender into the community.

III. *Operation of restorative justice programmes*

12. Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should respect the basic principles contained herein and should address, inter alia:

(a) The conditions for the referral of cases to restorative justice programmes;

(b) The handling of cases following a restorative process;

(c) The qualifications, training and assessment of facilitators;

(d) The administration of restorative justice programmes;

(e) Standards of competence and rules of conduct governing the operation of restorative justice programmes.

13. Fundamental procedural safeguards guaranteeing fairness to the offender and the victim should be applied to restorative justice programmes and in particular to restorative processes:

(a) Subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian;

(b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;

(c) Neither the victim nor the offender should be coerced or induced by unfair means to participate in restorative processes or to accept restorative outcomes.

14. Discussions in restorative processes that are not conducted in public should be confidential and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.

15. The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where this occurs, the outcome should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts.

16. Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings.

17. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

18. Facilitators should perform their duties in an impartial manner, with due respect to the dignity of the parties. In this capacity, facilitators should ensure that the parties act with respect towards each other and should enable the parties to find a relevant solution among themselves.

19. Facilitators shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties.

IV. *Continuing development of restorative justice programmes*

20. Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding of and enhance the effectiveness of restorative processes and outcomes in order to increase the extent to which restorative programmes are used and to explore ways in which restorative approaches might be incorporated into criminal justice practices.

22. Member States, in cooperation with civil society where appropriate, should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programmes. The results of research and evaluation should guide further policy and programme development.

V. *Saving clause*

23. Nothing in these Basic Principles shall affect any rights of an offender or a victim that are established in national law or applicable international law.

Annex II

List of participants

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Item 4 of the provisional agenda*
United Nations standards and norms in crime prevention and criminal justice

Implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions

Report of the Secretary-General**

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* E/CN.15/2002/1.

** The delay in submitting the present report was occasioned by the need for a comprehensive analysis of the replies received.

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I. Introduction

1. In December 1996, the General Assembly, concerned at the seriousness of problems posed by corruption, adopted the International Code of Conduct for Public Officials (resolution 51/59, annex) and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions (resolution 51/191, annex) and recommended them to Member States as tools to guide their efforts against corruption.

2. In its resolution 1998/21 of 28 July 1998, entitled "United Nations standards and norms in crime prevention and criminal justice", the Economic and Social Council requested the Secretary-General to prepare survey instruments on the United Nations Declaration against Corruption and Bribery in International Commercial Transactions and the International Code of Conduct for Public Officials. Pursuant to that request, in late 1999 the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention of the Secretariat sent two questionnaires concerning the above instruments to Member States. The present report contains an analysis of the replies received in connection with the implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions.

3. The attention of the Commission on Crime Prevention and Criminal Justice is drawn to the fact that, because of the time elapse between the receipt of the responses to the survey and the preparation of the present report, the information contained below may not fully reflect the latest developments as regards the legislation of some of the States responding.

II. Results of the survey

4. Replies to the survey instrument on the implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions were provided by 47 States: Algeria, Argentina, Austria, Belarus, Brazil, Brunei Darussalam, Bulgaria, Cameroon, Canada, Colombia, Costa Rica, Croatia, Czech Republic, Germany, Greece, Guatemala, Guyana, Iceland, Iraq, Italy, Japan, Kazakhstan, Lebanon, Lithuania, Luxembourg, Mali, Malta, Mauritius, Myanmar, New Zealand, Niger, Nigeria, Norway, Panama, Peru, Poland, Saudi Arabia, Singapore, Slovenia, South Africa, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and Yemen.

A. Existing legislation to combat corruption and bribery in international commercial transactions

5. More than half of the States responding reported that they had adopted legislation to combat corruption and bribery in international commercial transactions.[1] Among those countries, Argentina, Austria, Bulgaria, Canada, Costa Rica, the Czech Republic, Germany, Iceland, Japan, Nigeria, Norway, Panama, Slovenia and Switzerland had adopted relevant legislation between 1997 and 1999. Colombia reported the adoption of such legislation between 1995 and 1997, while Iraq, Italy, Lebanon, Mauritius, Myanmar, Singapore, Sweden and Yemen adopted such legislation prior to 1989.

6. Mali, Peru, South Africa and the United Kingdom replied that their legal systems did not refer specifically to corruption and bribery in international commercial transactions, but covered corruption in general. Peru indicated that it had signed and ratified, through Supreme Decree No. 012-97-RE, the Inter-American Convention against Corruption[2] which, inter alia, covered transnational bribery. The Prevention of Corruption Act of 1906 of the United Kingdom covered bribery of agents, in both the public and the private sector.

7. Brazil, Bulgaria, Colombia, Costa Rica, Croatia, the Czech Republic, Germany, Italy, Lithuania, Luxembourg, Mauritius, New Zealand, Norway, Poland, Slovenia, the United Kingdom and Yemen responded that relevant legislation to combat corruption and bribery in international commercial transactions had been proposed.[3]

B. Criminalization of bribery of foreign public officials

8. A majority of States replied that their legal systems criminalized the bribery of foreign public

officials by nationals, such as individuals, private corporations, public corporations and national corporations.[4] However, in Argentina, Austria, Bulgaria, the Czech Republic, Sweden and Switzerland such bribery is a criminal offence only for individuals.

9. Among the countries that replied that their respective legal systems did not criminalize bribery of foreign public officials by nationals, Luxembourg indicated that a related law had been presented to Parliament and was about to be adopted.

10. The replies provided show that, in countries in which the bribery of foreign public officials was criminalized, such an offence was punishable with imprisonment,[5] ranging from a minimum of one year (Norway) to life imprisonment (South Africa).[6] Several countries foresaw additional forms of sanction such as fines;[7] disqualification from holding public office (Argentina); loss of honorary titles, loss of military rank, expulsion, prohibition of residence, forfeiture of property and publicly beneficial work (Czech Republic); partial or total deprivation of civic and political rights (Niger); dismissal, reduction in rank, adjustment of remuneration, deferment of increment, stoppage of increment or reprimand (Trinidad and Tobago);[8] deprivation of electoral rights (United Kingdom); and confiscation of the proceeds derived from the bribery (Yemen). Aggravating circumstances were foreseen if the offender was a public official (Germany, Iceland and Italy) and if the offender was a recidivist (Saudi Arabia).

11. In the period from 1996 to 1998[9] prosecutions for bribery of foreign public officials were undertaken in Cameroon, Italy, Lebanon, Slovenia[10] and South Africa[11] and sentences were pronounced in Cameroon, Italy, Lebanon and Slovenia.[12] None of the countries replying indicated that there had been any legal transaction (i.e. payment of a fine) to avoid prosecution for the bribery of foreign public officials.[13]

C. Tax deductibility of bribes

12. Half of the countries replying reported that their legal systems did not include provisions to make it impossible for individuals to obtain tax benefits or deductions for payments outside their countries that would constitute bribery or other inappropriate payments to foreign public officials.[14]

13. On the other hand, Bulgaria, Canada, the Czech Republic, Germany, Nigeria, Norway, Slovenia, South Africa, Sweden, Switzerland and the United Kingdom indicated that their legal systems did include such provisions.

14. The tax legislation of Bulgaria did not allow the deductibility of bribes paid to foreign public officials. Donations and expenses that were tax deductible were enumerated exhaustively in the Corporate Income Tax Law (art. 23, para. 3). In Canada the offence of bribing a foreign public official[15] had been added to the list of offences found in section 67.5 of the Income Tax Act in order to deny the claiming of a bribe payment as a deduction. According to the legislation of the Czech Republic, a bribe payment was not considered an expense that could be deducted, that is, an expense necessary for generating, assuring and maintaining taxable income. The tax authorities have to report any evidence of bribery to law enforcement bodies.

15. Iceland noted that article 52 of Act No. 75/1981 on Tax on Income and Capital (the Tax Act) had been amended by Act No. 95/1998, which expressly provided that the following items could not be declared operating expenses or a deduction from taxable income: "payments, gifts or other contributions that are unlawful under article 109 of the General Penal Code, to persons engaged or elected to discharge an official, legislative or executive function, in Iceland, in other States, or with international organizations or institutions to which national States, governments or international institutions are parties". The provision applied to all taxable parties, private individuals and legal persons, including non-incorporated companies. The provision would be applied without regard to whether the person had been convicted of an offence against article 109 of the Penal Code, which criminalized the giving, the promise or offer to a public official, including a foreign public official or an official of a public international organization, of a gift or other advantage in order to induce him or her to take an action or to refrain from an action related to his or her official duty.

16. The Government of Singapore indicated that the Income Tax Act did not provide specifically for the non-deductibility of bribes paid to foreign public officials. However, such payments would not be tax deductible, as they did not fall within the conditions that had to be satisfied for tax deduction. Slovenia

reported that its domestic legislation governed, by a number of regulations,[16] the field of bookkeeping of business and tax liabilities in such a way that any possibility of paid bribes to be claimed as tax allowances was excluded. In Sweden, the Municipal Income Tax Act denied the deductibility of bribes and there were no exceptions to that denial. Likewise, the Swiss Federal Law on Prohibition of the Tax Deduction of Secret Commissions of 22 December 1999 stated that "secret commissions, within the meaning of Swiss criminal law, paid to Swiss or foreign public officials are not deductible and are classifiable as charges justified by commercial practice".

17. The United Kingdom indicated that section 577 denied relief for business entertaining and hospitality and all gifts. If a payment was described as a fee for services or a commission, the tax inspector was entitled to ask what the services in question were, and in case the fee or commission was excessive, the inspector could seek to disallow all or part of the payment as being a gift, without having to allege that the payment was corrupt in nature. Payments that were themselves criminal (in this case, bribes) were not tax-deductible, provided that the United Kingdom had jurisdiction over the offence. However, in accordance with the instructions given to tax inspectors on the application of section 577 on criminal payments, when such activities were outside the jurisdiction of the United Kingdom so that a payment could not be caught under domestic criminal law, the payment could be disallowed under section 577 "because they are gifts, or hospitality, or business entertaining".

D. Illicit enrichment

18. A majority of States replied that their legislations made illicit enrichment by public officials,[17] including elected representatives,[18] an offence.

19. Algeria indicated that, according to Order No. 156-66 of 8 June 1996, acts of illicit enrichment by public officials, including by elected representatives, could be determined under various forms of criminal offences, in particular treachery, transfer of public funds, abuse of power, bribery, acceptance of commissions from contracts, auctions or tenders committed at the time when the defendant was in office. The Penal Code of Argentina, under its article 268, paragraphs 1-3, punishes illicit enrichment by public employees and officials with imprisonment and disqualification from holding public office. The same applies to elected representatives, as the definition of public official provided in the Penal Code includes elected representatives. Austria indicated that, under its domestic law, there was no specific definition of the offence "illicit enrichment by public officials". However, section 20 of the Penal Code foresaw the criminalization of "unlawful enrichment", which covered any citizen. On the other hand, the criminalization of illicit enrichment by elected representatives was covered by section 265 of the Penal Code.

20. In Brazil, the legal basis for the criminalization of the illicit enrichment by public officials, including elected representatives, was Law No. 8429 of 2 June 1992; in Bulgaria it was article 283 of the Criminal Code, according to which the use of an official position to acquire an unlawful benefit was punishable by imprisonment of up to three years. The same provision applied to elected representatives.

21. Colombia noted that article 148 of the Penal Code, amended by article 96 of Law No. 190 of 1995, established the offence of illicit enrichment by public servants. Under those provisions, a public servant who, by reason of his or her office or functions, obtained an unsubstantiated increase in assets, provided that the act did not constitute another offence, would be liable to a term of ordinary imprisonment of from two to eight years and a fine equivalent to the amount of the enrichment, and he or she would be barred from public office for the term of the main penalty. The same punishment would be imposed on an intermediary for aiding and abetting an unsubstantiated increase in assets. In accordance with the Constitution, all public servants elected by popular vote were, for criminal law purposes, included within the category of public servants.[19] Accordingly, the criminal offence of illicit enrichment by public officials was applicable to them, should they obtain an unsubstantiated increase in assets by reason of their office or functions.

22. Costa Rica indicated that the Law on Illicit Enrichment punished public officials who were obliged to declare their assets but failed to do so. In addition, article 346 of the Penal Code foresaw penalties of imprisonment, from a minimum of two months to a maximum of two years, for any public official who

accepted undue privileges, or promised undue influence, made use of public information for financial gain or could not explain the increase in his or her net worth after taking office.

23. In accordance with article 338 of the Penal Law of Croatia, any official or responsible person in bodies of state government and units of local self-government and bodies that performed public services, who used his or her position or authority by giving preference in public tenders, or by giving, taking over or agreeing business, in order to obtain proprietary profit for his or her private activity or for private activity of a family member, was punishable by imprisonment of not less than six months and not more than five years. Germany indicated that there was criminal liability for demanding, allowing oneself to be promised or accepting an advantage or offering, promising or granting an advantage in return for performance of an official duty. It was of no importance whether the advantage was conferred, or was to be conferred, on the public official himself or herself or a third person. The term "advantage" did not only cover money payments, but also included any benefit to which the public official had no claim and which, in objective terms, put him in a better position, either tangibly or intangibly, in his or her financial, legal or even only personal situation. Under German law, there was criminal liability when somebody proceeded to buy a vote in an election or ballot. The consideration given in return must correspond to a tangible advantage that was sufficiently measurable and that could be expressed in a sum of money or in monetary worth. The voting behaviour and the consideration given must be aimed at a specific illegal arrangement.

24. In Guyana, the criminalization of illicit enrichment by pubic officials and by elected representatives was regulated by paragraph (a) of the Code of Conduct of the Integrity Commission Act of 1997 and section 27 of the Integrity Commission Act of 1997, respectively. In Iceland, the above-mentioned offence was regulated by section 14 of the Criminal Code, which dealt with offences committed in public positions, and by articles 128, 129, 136 and 138 of the Criminal Code. In Iraq, the issue was covered by the Penal Code, the Civil Service Law and the Code of Conduct of State and Socialist Sector Officials, and in Lebanon by Law No. 154 of 27 December 1999 on illicit enrichment.

25. The Government of Lithuania indicated that the offence of illicit enrichment by public officials, including elected officials, was regulated by article 285 on office abuse; article 282 on accepting a bribe; article 283 on undue remuneration; article 284 on suborning; article 319 on commercial subornation; and article 320 on accepting an illicit payment. In Luxembourg, the relevant articles of the Penal Code covering this offence were those dealing with embezzlement, extortion and corruption (arts. 240, 241, 243, 251 and 256). Mali noted that a relevant law adopted in 1982 established that any person who was convicted of the crime of illicit enrichment was liable to penalties applicable to serious indictable offences. The same law applied to elected representatives.

26. In Myanmar, the Bribery and Corruption Act of 1998 made illicit enrichment by public officials an offence. In New Zealand, the Crime Act of 1961 covered both active and passive corruption of judicial officers, Members of the Executive Council, Ministers of the Crown, Members of Parliament, law enforcement officers and other officials. In addition, the Income Tax Act of 1994 provided various offences related to tax evasion. In Nigeria the offence was regulated by the Anti-Corruption Act, the Money-Laundering Decree and the Recovering of Public Property Act, and in Panama by article 335, paragraph 4, of the Criminal Code and article 5 of Law No. 59 of 29 December 1999. In Peru, illicit enrichment by public officials, including elected representatives, was covered by article 401 of the Criminal Code, which stated that any public official or civil servant who illicitly acquired wealth by reason of his or her position was subject to imprisonment for not less than 5 years and not more than 10 years.

27. Saudi Arabia indicated that the offence of illicit enrichment by public officials was provided for in Royal Decree No. 16 on the investigation of sources of enrichment. In South Africa, although illicit enrichment per se was not an offence, it could be regarded as corruption, which was regulated by section 1, paragraph 1, of the Corruption Act of 1992 (Act No. 94 of 1992). As far as elected representatives were concerned, the Executive Members' Ethics Act of 1998 (Act No. 82 of 1998) introduced a code of ethics governing the conduct of members of the Cabinet, deputy ministers and members of provincial executive councils. The Act required that Cabinet members, deputy ministers and members of executive councils

disclosed their financial interests, as well as gifts and benefits of a material nature received by them after the assumption of the office. South Africa's Public Protector was obliged to investigate any alleged breach of the code of ethics on receipt of a complaint.

28. In Sweden, illicit enrichment was covered in part by the provisions on bribery. Furthermore, the origin of the enrichment had to be disclosed, according to the taxation law. If the enrichment was illicit, action could normally be taken on the basis of the legal provisions on bribery. This also applied to elected representatives.

29. According to the domestic legislation of the former Yugoslav Republic of Macedonia, a public official who requested or received a present or some other benefit or accepted the promise of a present or some other benefit in order to perform an act within the framework of his or her own official duty that he or she should not perform, or to refrain from performing his or her official duty, could be punished with imprisonment of 1-10 years.

30. Trinidad and Tobago indicated that national legislation made illicit enrichment an offence only by certain public officials, such as police officers and customs officers. However, sections 76 and 78 of the Constitution included the following provisions, respectively, which applied to all public officials:

> "Except with the permission of the Commission, an officer shall not accept any gifts from any member of the public or from any organization for services rendered in the course of his official duties"

and

> "An officer who is offered a bribe shall immediately inform the Permanent Secretary or Head of Department who shall report the matter to the Police and advise the Commission".

As far as elected representatives were concerned, the Integrity in Public Life Act No. 8 of 1987 established that every person in public life, including members of the House of Representatives, ministers, parliamentary secretaries, permanent secretaries and chief technical officers, were required to file an annual declaration of income, assets and liabilities with the Integrity Commission. A person who failed to file a declaration or made a false declaration was guilty of an offence and was liable on summary conviction to a fine and imprisonment of two years.

31. The United Kingdom reported that the behaviour of illicit enrichment by public officials might constitute fraud or theft, which were criminal offences punishable by a fine and/or imprisonment for a maximum of 7 and 10 years respectively (Theft Act of 1968). It might also be considered corruption as defined in the Public Bodies Corrupt Practices Act of 1889. There was also a common law offence of misconduct in a public office that might apply. In addition, the United Kingdom indicated that the Government was considering the introduction of a new statutory offence of misuse of public office, which could cover illicit enrichment. The same provisions mentioned above applied to elected representatives.

32. In Yemen, illicit enrichment by public officials was covered by Crime and Penalty Law No. 12 of 1994, Law No. 6 of 1995 on the prosecution of persons holding high-ranking public office, Presidential Decree No. 3 of 1996 on Establishment and Terms of Reference of Public Property Courts, Judiciary Act No. 1 of 1991 and the draft law on financial responsibility and accountability. The offence of illicit enrichment by elected representatives was regulated by General Elections Law No. 14 of 1992 and the amendments thereto and Local Authority Law No. 24 of 2000.

E. Corporate criminal liability

33. The legal system of the majority of the countries included provisions to establish corporate criminal liability.[20]

34. In Algeria, according to article 5 of Order No. 22-96 of 9 July 1996, companies committing breaches, such as making false statements or failing to obtain the required licences, were penalized by fines up to fivefold the value of the damages together with the confiscation of the site of the offence. Austrian criminal law recognized only a very limited criminal responsibility of legal persons, since it was only possible to confiscate the proceeds of crime directly from a legal person if the legal person had been illegally enriched (see sect. 20, para. 4, of the Penal Code). Austria also indicated that it would shortly introduce into its legal system the responsibility of

legal persons, in accordance with the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests of the European Union.[21] In Cameroon, corporate managers and other employees who infringe the penal law were liable to criminal prosecution and the corporate entity might also be held liable under civil law. In Canada, the offence of bribing a foreign public official could be committed by any person within the full meaning of "persons" as defined in section 2 of the Criminal Code.

35. Colombia indicated that the criminal liability of corporate entities as understood in other legislations did not exist in the country, since the Penal Code was based on the prerequisites of individual criminal liability. However, criminal law had in recent years incorporated provisions that made it possible to punish corporate entities engaging in unlawful activities (Law No. 365 of 1997). Under those provisions, if, at any time during criminal proceedings, the judicial official established proof that corporate entities, companies or organizations had wholly or partly engaged in unlawful activities, he or she might order the competent authority to withdraw its legal status or close its premises or commercial establishments. Legal entities in Croatia were not strictly criminally responsible, but could be held responsible for other types of violation. In Germany, non-criminal fines could be imposed on legal persons and associations and engagement in a trade could be prohibited where there was unreliability.

36. Iceland replied that, in order to fulfil the country's obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development,[22] the Parliament had enacted Act No. 144/1998 on Criminal Responsibility of Legal Persons on Account of Bribery of Public Officials. According to article 1 of the Act:

> "A legal person may be fined if its employee or staff member has, in order to secure or maintain business or other improper gain for the benefit of the legal person, given, promised or offered a public servant a gift or other advantage in order to induce the public servant to take a measure or to refrain from taking a measure within the sphere of his or her public duties. This shall also apply to such acts committed with respect to foreign public servants or officials acting for international institutions."

The general principles governing criminal liability of legal persons were laid down in Section II A, article 19 (a)-(c), of the Penal Code, and applied to criminal liability under Act No. 144/1998.

37. In Iraq, corporate criminal liability was reported to be regulated by article 80 of the Penal Code and by articles 213 and 214 of the Companies Law. In Italy, according to article 11 of Legislative Decree No. 300/2000, a criminal court could apply administrative sanctions to legal persons. In Japan, criminal liability could be placed on legal persons, including companies, according to the Unfair Competition Prevention Law. Criminal liability was based on the principle that the companies had not taken due care to prevent the employees' culpable act in the selection or supervision of them.

38. Lithuania reported that its domestic legal system did not foresee any provision on corporate criminal liability, but that the draft criminal code, under discussion at the moment of the preparation of its reply, included such a provision. In Luxembourg, on the basis of article 203 of the Commercial Company Act, the courts could order the winding-up or liquidation of a company that conducted business in breach of criminal law. In New Zealand, the Interpretation Act of 1999 provided that all criminal statutes were presumed to apply to legal bodies (such as companies, including state-owned or state-controlled companies), as well as to natural persons. In Nigeria, corporate criminal liability was established by the Money Laundering Decree and in Norway by section 48 A of the Penal Code.

39. Panama reported that, on the basis of article 125 of its Criminal Code, companies were liable for punishable acts committed by their managers, administrators or legal representatives involving abuse of office in the performance of their official functions. In Slovenia, the Liability of Legal Persons for Criminal Offences Act of 1999 established that a legal person was liable for a criminal offence in the name of, on behalf of or in favour of a legal person: (a) if the criminal offence committed meant carrying out an illegal resolution, order or endorsement of its management and supervisory bodies; (b) if its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence; (c) if it had at its disposal illegally obtained property gains or used objects gained through a criminal offence; and

(d) if its management or supervisory bodies omitted obligatory supervision of the legality of the actions of the employees subordinate to them. Legal persons were liable among others also for corruption criminal offences. Sanctions that could be imposed on legal persons included fines, expropriation of property gains or termination of legal entity status, as well as special safety measures, such as the publication of the judgement and prohibition of a certain economic activity.

40. Trinidad and Tobago reported that the Fourth Schedule of the Exchange Control Act, chapter 79:50, provided that a corporate body might be held criminally liable on summary conviction to a fine of 5,000 Trinidad and Tobago dollars (TT$), and on conviction of indictment to a fine of TT$ 10,000 if found guilty of an offence under the Act. Sections 508-511 of the Companies Act, chapter 88:01, outlined offences for which corporate firms could be held criminally liable. These included, inter alia, the abuse of corporate status, the making of untrue statements or facts and the omission of material statements or facts by companies in their reports, returns, notices or other documents. With regard to corporate criminal liability in respect of international commercial transactions, Trinidad and Tobago indicated that there was not yet a relevant legislative provision, but that new draft legislation was pending.

41. In the United Arab Emirates, the liability of legal persons was regulated by the Law on Commercial Companies, issued by virtue of Federal Law No. 8 of 1984 and amended by Federal Laws No. 13 of 1988 and No. 4 of 1990, and in Yemen by Crime and Penalty Law No. 12 of 1994, Presidential Decree Law No. 37 of 1992 on Supervision and Control over Foreign Companies and Business, together with its Executive Act issued by Presidential Decree No. 192 of 1999.

42. Under the legal system of the United Kingdom, it was an accepted principle that any reference to "person" included a legal as well as a natural person.

F. Legislation against money-laundering

43. The domestic legislation of almost half of the States that responded to the survey did not include bribery of foreign public officials among the predicate offences in the legislation against money-laundering.[23]

44. Among the States whose domestic legislation included such a provision, Austria indicated that bribery offences were explicitly mentioned as predicate offences in the text of the relevant provision of the Austrian Penal Code (sect. 165, "Money laundering"). In Bulgaria, according to article 253 of the Criminal Code, there were no restrictions concerning the predicate offences for money-laundering and that the bribery of foreign public officials was therefore regarded as a predicate offence for money-laundering. Under the Corruption of Foreign Public Officials Act of Canada, it was an offence to possess or to launder property and proceeds obtained or derived from bribing a foreign public official.

45. Croatia reported that article 279 of the Penal Law, relating to money-laundering, established that any offence for which imprisonment of five years could be imposed and any offence committed by a group or criminal organization could be considered a predicate offence for money-laundering. According to the domestic law of the Czech Republic, any economic benefit derived from activity that constituted a criminal offence was subject to the anti-money-laundering legislation.

46. In Iceland, article 264, paragraph 1, of the Penal Code provided that whoever received or procured for himself or herself or others any gain from an offence committed against the Code should be fined and imprisoned for up to two years. Bribery of a public official could be a predicate offence in the context of money-laundering. This applied equally to bribery of domestic and of foreign public officials. The Icelandic criminal law applied in the case of a violation of article 264 of the Penal Code committed in Icelandic territory, even if the predicate offence was committed abroad, and irrespective of the offender's identity. The location where the offence of bribery was committed had no bearing on the criminality of the act of money-laundering.

47. Singapore indicated that corruption, which under domestic law also included bribery of foreign public officials, was one of the predicate offences in the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act. Slovenia affirmed that this issue was regulated by article 252 of the Penal Code. Money-laundering legislation in the United Kingdom provided that all indictable offences (i.e. offences that could be tried in Crown Court) were

predicate offences. In Yemen, the bribery of foreign public officials as a predicate offence for money-laundering was established under Crime and Penalty Law No. 12 of 1994 and Law No. 6 of 1995 on the prosecution of persons holding high-ranking public office of the executive or other authority of the State.

G. Accounting standards, business codes, standards and best practices

48. Austria, Bulgaria, Canada, Colombia, Germany, Greece, Guyana, Japan, Lithuania, Malta, Mauritius, Singapore, Slovenia, Sweden, Trinidad and Tobago and Yemen reported that they had developed or maintained accounting standards and practices that had improved the transparency of international commercial transactions during the period from 1997 to 1999.[24]

49. Austria indicated that, according to the regulations of the Austrian Commercial Code, which entered into force on 1 July 1996, each joint stock company was obliged to submit its balance sheet to the commercial register in order to be made public. In Bulgaria, the Accountancy Law, amended in 1998, provided for the observation of standards and practices in order to ensure the transparency of any transactions of enterprises. During the period from 1997 to 1999, the following Handbook Sections were released by the Canadian Institute of Chartered Accountants: (a) *Segment Disclosures*; (b) *Income Taxes*; (c) *Cash Flow Statements*; and (d) *Employee Future Benefits*.

50. Colombia indicated that it had internal regulations aimed at establishing uniform and transparent accounting mechanisms. All traders, for example, were obliged to keep books of account and the organizational regulations of the financial system established the single accounts plan whereby the book-keeping of supervised financial entities had to be carried out in the same manner and follow the same procedure. Those regulations required financial entities to establish mechanisms for the prevention of unlawful activities, such as those committed by persons using the financial system in order to conceal criminal operations. In addition, the Penal Code established the offence of money-laundering, which was deemed committed even if it was prepared abroad. Finally, the Anti-Corruption Statute (Law No. 190 of 1995) established certain accounting control systems in order to make the activities of specific corporate entities more transparent. The Law empowered the Government to issue regulations so that audit operations assisted in the detection and discovery of situations that might constitute practices in breach of the provisions or principles of the Anti-Corruption Statute. Chapter VIII of the Statute contained provisions regarding financial inspections whose purpose was to prevent payments by foreign corporate entities to government officials.

51. Lithuania noted that the transparency of international commercial transactions was promoted by the Law on Declaration of Property and the Income by Residents, the Law on the Prevention of Money-Laundering and the Law on Public Procurement, while Luxembourg indicated that a legislative bill providing for the introduction of a minimum standardized accounting plan had been submitted to the Chamber of Deputies.

52. According to the legislation of Malta, the Financial Services Centre carefully monitored accounting standards. Since 1989, the Accounting and Auditing Standards Committee had been working in Mauritius to formulate and publish accounting and auditing standards.

53. In Singapore, commercial companies had adopted the statements of accounting standards issued by the Institute of Certified Public Accountants, the national organization of the accounting profession in Singapore. As far as government accounting was concerned, Singapore subscribed to the special data dissemination standard developed by the International Monetary Fund. In 1995, the Auditing Institute of Slovenia issued the Code of Accounting Principles and the Code of Professional Ethics of Accountants. According to accounting legislation in Sweden, business transactions must be recorded in chronological order and in a systematic manner and vouchers must be available to support all accounting entries.

54. Trinidad and Tobago reported that it maintained accounting standards and practices that had been formulated by the International Accounting Standards Committee. Those standards had been adopted and implemented by the Institute of Chartered Accountants of Trinidad and Tobago and must satisfy recognition, measurement, presentation and disclosure requirements.

55. Several countries that had improved the transparency of international commercial transactions in the period from 1997 to 1999 indicated that their respective accounting standards and practices were in compliance with the standards developed by the following international organizations: the Council of Europe (Bulgaria and Lithuania), the European Union (Austria, Bulgaria, Greece and Sweden), the Organisation for Economic Cooperation and Development (Bulgaria and Germany), the Financial Action Task Force on Money Laundering (Greece, Lithuania and Trinidad and Tobago), the International Monetary Fund (Singapore) and the International Accounting Standards Committee (Canada, Singapore, Sweden and Trinidad and Tobago).

56. Austria, Cameroon, Canada, Colombia, Germany, Greece, Japan, Iraq, Lithuania, Luxembourg, Myanmar, Norway, Slovenia, Trinidad and Tobago, the United Kingdom and Yemen reported that in the period from 1997 to 1999 they had developed or encouraged the development of business codes, standards and best practices prohibiting corruption, bribery and other related illicit practices in international commercial transactions.[25] Those codes and best practices were in line with the standards developed by the following intergovernmental organizations: the Caribbean Financial Action Task Force (Trinidad and Tobago), the Council of Europe (Lithuania and Norway); the European Union (Greece and Norway), the Financial Action Task Force on Money Laundering (Lithuania and Trinidad and Tobago), and the Organisation for Economic Cooperation and Development (Germany, Japan and Norway).

H. Mutual legal assistance, extradition and enforcement cooperation

57. Between 1997 and 1999, the following States received requests for mutual legal assistance from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions: Austria, Brazil, Brunei Darussalam, Italy, Lebanon, Lithuania, Luxembourg, Nigeria, Norway, Poland, Singapore, Slovenia, South Africa (39), Switzerland (over 100) and United Kingdom.[26]

58. During the same period of time, the following countries made requests for mutual legal assistance from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions: Brunei Darussalam, Italy, Lebanon, Nigeria, Norway (25), South Africa, Switzerland (less than 10) and United Kingdom.[27]

59. From 1997 to 1999, requests for extradition from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions were received from Austria, Italy, Lebanon, Nigeria, South Africa (59), Switzerland, Trinidad and Tobago, the United Kingdom and Yemen (70),[28] while requests for extradition were made by Argentina, Italy, Lebanon, Nigeria, South Africa (19), Switzerland, the United Kingdom and Yemen.[29]

60. In many of the States responding, domestic legislation allowed law enforcement authorities to share information directly with law enforcement authorities of other countries without the conclusion of treaties of mutual legal assistance.[30]

61. Regarding the conditions under which such information was shared, Argentina, Brazil, the Czech Republic, Germany, Greece, Guatemala,[31] Malta, Nigeria and Slovenia indicated that the direct sharing of information with enforcement authorities in other countries, without the conclusion of treaties of mutual legal assistance, was subject to the existence of a condition of reciprocity. Lebanon, Mauritius, Saudi Arabia and South Africa replied that the direct exchange of information was undertaken through the channels of the International Criminal Police Organization (Interpol).

62. In Colombia, in cases where a mutual legal assistance treaty or agreement did not exist, the judicial authority might have recourse to the provisions of the Code of Criminal Procedure. In Japan, law enforcement authorities might share information with their foreign counterparts without a formal mutual legal assistance request, unless the information was sought as evidence. In Switzerland, the issue was regulated by article 67 (a), on voluntary transmission of evidence and information, of the Federal Law on International Mutual Legal Assistance in Criminal Matters, while in Singapore such an exchange of information was allowed only on a case-by-case basis and for purposes of investigation and intelligence.

63. Trinidad and Tobago noted that the Mutual Assistance in Criminal Matters Act No. 39 of 1997 had been enacted to regulate mutual assistance matters between the country and the other Commonwealth countries. Assistance was provided for under the Act in criminal matters with respect to the following instances: obtaining evidence; locating or identifying a person; obtaining articles or things through search and seizure; serving documents; transmission and return of documents; tracing documents; obtaining restraining orders; and securing transfer of a prisoner. In the United Kingdom, the absence of treaties and conventions was no hindrance to offering assistance to another country, as long as the request for assistance met the criteria of the Criminal Justice Act of 1990.

64. Argentina, Brazil, Bulgaria, Costa Rica, the Czech Republic, Germany,[32] Greece, Iceland,[33] Nigeria, Norway and Slovenia reported that in the period from 1997 to 1999 they had adopted legislation concerning law enforcement cooperation to combat corruption and bribery in international commercial transactions,[34] while Costa Rica, the Czech Republic, Germany, Luxembourg, Mauritius, New Zealand, Norway, Poland, Slovenia, Sweden, the former Yugoslav Republic of Macedonia and Yemen indicated that, in the same period, draft legislation had been proposed and its formal enactment was pending.[35]

I. Adherence to relevant international treaties

65. Because of the time lapse between the receipt of the responses to the survey and the preparation of the present report, the information on the status of adherence (i.e. signature and ratification) to the existing international legal instruments against corruption may have changed considerably. In that connection, the attention of the Commission on Crime Prevention and Criminal Justice is drawn to the report of the Secretary-General of 2 April 2001 on existing international legal instruments, recommendations and other documents addressing corruption (E/CN.15/2001/3), submitted to the Commission at its tenth session, which contains more recent information on the status of signatures and ratification of the existing conventions against corruption.

66. During the period from 1997 to 1999, Argentina, Austria, Brazil, Bulgaria, Canada, the Czech Republic, Germany, Greece, Iceland, Italy, Japan, Lithuania, Norway, Slovenia, Sweden, Switzerland and the former Yugoslav Republic of Macedonia adopted legislation concerning effective implementation of the principal existing international instruments relating to the various aspects of the problem of corruption and bribery in international commercial transactions.[36]

67. Bulgaria, Croatia, the Czech Republic, Italy, Lebanon, Lithuania, Luxembourg, Mauritius, New Zealand, Norway, Poland, Slovenia, the former Yugoslav Republic of Macedonia and the United Kingdom indicated that during the same period they had proposed such legislation, which was still pending.[37]

III. Conclusions

68. Although it is difficult to ascertain whether the adoption by the General Assembly of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions has had a direct impact on domestic legislation, the analysis of the replies to the survey indicates that the main principles and provisions embodied in the Declaration are reflected, to different degrees and with different modalities, in the implementation of legislation at the national level in many States.

69. The signature and ratification of the existing international legal instruments against corruption, which have been negotiated and adopted under the aegis of different intergovernmental organizations in recent years and which refer to the principles of the Declaration, will undoubtedly foster and strengthen its application at the domestic level.

70. It is also to be hoped that the content and the spirit of the Declaration will inspire the negotiations of the United Nations Convention against Corruption, which started in January 2002.

Notes

[1] Argentina, Austria, Bulgaria, Canada, Colombia, Costa Rica, the Czech Republic, Germany, Greece, Iceland, Iraq, Italy, Japan, Lebanon, Mauritius, Myanmar, Nigeria, Norway, Panama, Peru, Singapore, Slovenia,

Sweden, Switzerland, the United Kingdom and Yemen. Brazil, Guyana and Saudi Arabia replied that information was not available.

[2] E/1996/99, annex.

[3] Belarus, Cameroon, Guatemala, Iraq, Lebanon, Mali, Malta, Nigeria, Panama and Saudi Arabia replied that information was not available in connection with the question whether their country had adopted legislation to combat corruption and bribery in international commercial transactions.

[4] Argentina, Austria, Bulgaria, Cameroon, Canada, the Czech Republic, Germany, Greece, Iceland, Iraq, Italy, Japan, Kazakhstan, Lebanon, the Niger, Nigeria, Norway, Saudi Arabia, Singapore, Slovenia, South Africa, Sweden, Switzerland, Trinidad and Tobago, the United Kingdom and Yemen. Brazil, Guyana and the former Yugoslav Republic of Macedonia replied that information was not available.

[5] Germany indicated that sentences of imprisonment could not be imposed on legal persons and associations. They could only receive a non-criminal fine.

[6] A sentence of life imprisonment or imprisonment for an indefinite period could be imposed only by the Supreme Court.

[7] Cameroon, Canada, the Czech Republic, Germany, Iraq, Japan, Kazakhstan, Lebanon, the Niger, Nigeria, Norway, Saudi Arabia, Slovenia, South Africa, Sweden, Trinidad and Tobago, the United Kingdom and Yemen

[8] These are disciplinary measures that the Public Service Commission can impose under Regulation 110.

[9] Austria, Brazil, Bulgaria, the Czech Republic, Germany, Greece, Iraq, Kazakhstan, Saudi Arabia, South Africa, Sweden, the United Kingdom and Trinidad and Tobago replied that information on whether any prosecution was undertaken between 1996 and 1998 for the offence of bribery of foreign public official was not available. Austria, Brazil, Belarus, Bulgaria, Colombia, the Czech Republic, Germany, Greece, Iraq, Saudi Arabia, South Africa, Sweden, Switzerland, Trinidad and Tobago and the United Kingdom replied that information on whether any sentence was pronounced between 1996 and 1998 for this offence was not available.

[10] Some 36 prosecutions in 1996, 29 prosecutions in 1997 and 19 prosecutions in 1998.

[11] Some 16 prosecutions in 1996, 20 prosecutions in 1997 and 35 prosecutions in 1998.

[12] Some 19 sentences in 1996, 13 sentences in 1997 and 15 sentences in 1998.

[13] Brazil, Colombia, the Czech Republic, Germany, Greece, Japan, Iraq, Kazakhstan Saudi Arabia, Singapore, South Africa, Switzerland, Trinidad and Tobago and Yemen replied that information was not available in this connection.

[14] Algeria, Brazil, Brunei Darussalam, Cameroon, Croatia, Greece, Guyana, Italy, Lebanon, Lithuania, Luxembourg, Mali, Malta, Mauritius, New Zealand, the Niger, Panama, Poland, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, the United Arab Emirates and Yemen. Luxembourg and New Zealand indicated that a law disallowing tax deductibility for payments outside the country that would constitute bribes or other inappropriate payments to foreign public officials was pending. Belarus, Iraq, Kazakhstan, Myanmar, Saudi Arabia and Singapore indicated that no information was available in this connection. It should be noted that question 10 of the questionnaire in the Spanish translation was formulated as follows: "Are provisions included in your legislation and/or regulatory measures to make it to *possible* for individuals to obtain tax benefits or deductions for payments outside their countries that would constitute bribes or other inappropriate payments to foreign public officials?" Argentina, Colombia, Costa Rica and Guatemala replied "no" to the question so formulated.

[15] See section 3 of the Corruption of Foreign Public Officials Act.

[16] Article 9 of the Personal Income Tax, the Corporate Profit Tax Act, the Accountancy Act, as well as article 240 of the Slovenian Penal Code.

[17] Algeria, Argentina, Brazil, Brunei Darussalam, Bulgaria, Colombia, Costa Rica, Croatia, Greece, Guyana, Iceland, Iraq, Kazakhstan, Lebanon, Lithuania, Luxembourg, Mali, Malta, Myanmar, New Zealand, the Niger, Nigeria, Panama, Peru, Saudi Arabia, South Africa, Trinidad and Tobago, the former Yugoslav Republic of Macedonia, the United Kingdom and Yemen. Norway replied that no information was available in connection with the question whether illicit enrichment by a public official was an offence under national legislation.

[18] Algeria, Argentina, Brazil, Brunei Darussalam, Bulgaria, Colombia, Greece, Guyana, Iceland, Iraq, Kazakhstan, Lebanon, Lithuania, Luxembourg, Mali, Malta, Myanmar, New Zealand, the Niger, Nigeria, Panama, Peru, South Africa, Trinidad and Tobago, United Kingdom and Yemen. Myanmar, Norway, Saudi Arabia and the former Yugoslav Republic of Macedonia replied that no information was available in connection with the question whether the illicit enrichment by elected representatives was an offence under national legislation.

[19] The President of the Republic, the Vice-President, senators, representatives, governors, deputies of departmental assemblies, mayors and councillors.

[20] Algeria, Austria, Cameroon, Canada, Colombia, Germany, Guyana, Iceland, Iraq, Italy, Japan, Lebanon, Luxembourg, New Zealand, the Niger, Nigeria, Norway, Panama, Saudi Arabia, Singapore, Slovenia, South Africa, Sweden, the United Arab Emirates, the United Kingdom and Yemen. Brazil, Mauritius and Myanmar indicated that no information was available in this connection.

[21] *Official Journal C221*, 19 July 1997, pp. 0012-0022.

[22] See *Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18).

[23] Algeria, Argentina, Belarus, Brunei Darussalam, Cameroon, Colombia, Costa Rica, Croatia, Guatemala, Guyana, Lebanon, Lithuania, Luxembourg, Mali, Malta, Mauritius, New Zealand, Panama, Poland, South Africa, the former Yugoslav Republic of Macedonia, Trinidad and Tobago and the United Arab Emirates. Luxembourg, New Zealand and Poland indicated that legislation that would establish the bribery of a foreign public official as a predicate offence under their respective money-laundering legislation was pending. Brazil, Iraq, Myanmar and Saudi Arabia replied that no information was available in this connection.

[24] Belarus, Brazil, Croatia, Iraq, Kazakhstan, Mali, the Niger, Norway, Saudi Arabia and South Africa replied that no information was available in this connection.

[25] Algeria, Argentina, Brunei Darussalam, Croatia, the Czech Republic, Guatemala, Lebanon, Mauritius, New Zealand, the Niger, Panama, Poland, Singapore, Sweden, Switzerland, the former Yugoslav Republic of Macedonia and the United Arab Emirates replied that no information was available in this connection.

[26] Argentina, Belarus, the Czech Republic, Germany, Iraq, Kazakhstan, Mali, Saudi Arabia, the former Yugoslav Republic of Macedonia and Yemen replied that no information was available in connection with the question whether their country had received between 1997 and 1999 requests for mutual legal assistance from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions.

[27] Argentina, Austria, Belarus, Colombia, the Czech Republic, Germany, Kazakhstan, Mali, Saudi Arabia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia and Yemen replied that no information was available in connection with the question whether their country had made between 1997 and 1999 requests for mutual legal assistance from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions.

[28] Argentina, Belarus, the Czech Republic, Kazakhstan, Germany, Mali, Myanmar, South Africa, Slovenia, Sweden and the former Yugoslav Republic of Macedonia replied that no information was available in connection with the question whether their country had received between 1997 and 1999 requests for extradition from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions.

[29] Austria, Belarus, the Czech Republic, Germany, Kazakhstan, Mali, Saudi Arabia, Slovenia, Sweden and the former Yugoslav Republic of Macedonia replied that no information was available in connection with the question whether their country had made between 1997 and 1999 requests for extradition from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions.

[30] Argentina, Austria, Brazil, Bulgaria, Canada, Colombia, Croatia, the Czech Republic, Germany, Greece, Guatemala, Iceland, Japan, Kazakhstan, Lebanon, Malta, Mauritius, New Zealand, the Niger, Nigeria, Norway, Peru, Poland, Saudi Arabia, Singapore, Slovenia, South Africa, Switzerland, Trinidad and Tobago, the United Kingdom and Yemen. Myanmar replied that no information was available in this connection.

[31] Guatemala indicated that the sharing of information was possible only if the data in question were not confidential and provided also that the sharing did not prejudice any investigation carried out in the country.

[32] Germany indicated that the new legislation was related to the implementation at the national level of the Criminal Law Convention on Corruption of the Council of Europe and of the Joint Action on Corruption in the Private Sector of the European Union.

[33] Iceland indicated that on 25 March 2001 it had become a member of the Schengen Agreement. In its reply, Iceland stressed that, according to article 39 of the Agreement, contracting parties undertook to ensure that their police authorities assisted each other for the purposes of preventing and detecting criminal offences, which included also combating corruption and bribery in international commercial transactions. Iceland also indicated that it was a member of the Police and Customs Cooperation in the Nordic Countries and that it had signed an agreement with the European Police Office (EUROPOL) that strengthened police cooperation between Iceland and the other member States of EUROPOL.

[34] Colombia, Iraq, Kazakhstan, Mauritius, Myanmar and Saudi Arabia indicated that no information was available in connection with the question whether their country had adopted legislation concerning law enforcement cooperation to combat corruption and bribery in international commercial transactions.

[35] Belarus, Brazil, Bulgaria, Cameroon, Canada, Colombia, Guyana, Iraq, Kazakhstan, Mali, Nigeria and Saudi Arabia replied that no information was available in this connection.

[36] Belarus, Guatemala, Iraq, Kazakhstan, Mali, Mauritius, Saudi Arabia, Singapore and Yemen replied that no information was available in this connection.

[37] Belarus, Brazil, Kazakhstan, Mali, Panama, Saudi Arabia, Singapore and Yemen replied that no information was available in this connection.

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Implementation of the International Code of Conduct for Public Officials

Report of the Secretary-General**

I. Introduction

1. In December 1996, the General Assembly, concerned at the seriousness of the problems posed by corruption, adopted the International Code of Conduct for Public Officials (resolution 51/59, annex) and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions (resolution 51/191, annex) and recommended them to Member States as tools to guide their efforts against corruption.

2. In its resolution 1998/21 of 28 July 1998, entitled "United Nations standards and norms in crime prevention and criminal justice", the Economic and Social Council requested the Secretary-General to prepare survey instruments on the United Nations Declaration against Corruption and Bribery in International Commercial Transactions and the International Code of Conduct for Public Officials. Pursuant to that request, in late 1999 the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention of the Secretariat sent two questionnaires concerning the above instruments to Member States. The present report contains an analysis of the replies received in connection with the implementation of the International Code of Conduct for Public Officials.

3. The attention of the Commission on Crime Prevention and Criminal Justice is drawn to the fact that, because of the time lapse between the receipt of the responses to the survey and the preparation of the present report, the information contained below may not fully reflect the latest developments as regards the legislation of some of the States responding.

* E/CN.15/2002/1.

** The delay in submitting the present report was occasioned by the need for a comprehensive analysis of the replies received.

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II. Results of the survey

4. Replies to the survey instrument on the implementation of the International Code of Conduct for Public Officials were received by the following 54 States: Algeria, Angola, Antigua and Barbuda, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, Central African Republic, Chile, Colombia, Congo, Costa Rica, Cuba, Cyprus, Czech Republic, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Haiti, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Norway, Panama, Peru, Poland, Qatar, Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

A. Existence of codes of conduct for public officials

5. A majority of States responding indicated that their domestic laws or administrative policies included codes of conduct that set out clearly and consistently the functions and duties of public officials.[1]

6. Costa Rica noted that it had no code of conduct per se setting out specific obligations for public officials. However, Law No. 6872 of 17 June 1983, the Law on the Illicit Enrichment of Public Servants, provided for disciplinary measures in the event of non-compliance with the requirements regarding declaration of assets, which were imposed upon certain high-ranking officials. In addition, various statutes and service-specific regulations were in force that were applicable to each of the public bodies and institutions whose employees were public officials.

7. Germany indicated that the functions and duties of public officials were not established on a uniform basis, but differed according to whether the public official concerned was subject to a special service and allegiance relationship, laid down by law, as a civil servant, judge or member of the armed forces, or whether they were employed staff (i.e. salaried employees or manual workers), whose employment relationship was basically governed by collective agreements and individual contracts.

8. Greece reported that a special committee within the Ministry of the Interior, Public Administration and Decentralization had prepared a Code of Ethics of Civil Servants with a view to preventing illegal conduct.

9. In Hungary, the XXIII Act of 1992 on the Legal Status of Civil Servants contained general ethical principles, rules on conflict of interest and rules concerning confidential information. The Code of Conduct for Civil Servants, which included more detailed rules, had been completed on 31 December 1999 and had been incorporated into the XXIII Act on the Legal Status of Civil Servants on 1 January 2001.

10. Norway indicated that, while domestic laws and administrative policies did not incorporate codes of conduct as such, the functions and duties of public officials were dealt with in a number of laws and administrative polices.

11. Many of the States that replied that their respective domestic laws or administrative policies included codes of conduct setting out clearly and consistently the functions and duties of public officials reported also that those codes were incorporated into a law.[2]

12. As regards the time of the adoption of the codes of conduct, more than half of the States indicated that such codes had been adopted before 1989.[3] Belarus, the Central African Republic, the Congo, the Czech Republic, Malta, Slovenia and Thailand noted that their national codes of conduct for public officials had been adopted during the period from 1989 and 1994, while in Colombia, Finland and Italy they had been adopted between 1994 and 1996 and in Argentina, Burundi, Cuba, Ecuador, Guyana, Japan, Lithuania, Peru, South Africa and Uruguay between 1996 and 1999.

13. It is interesting to note that most States[4] that had adopted codes of conduct for public officials in the period from 1996 to 1999 declared that those codes had been inspired to a greater or lesser degree by the International Code of Conduct for Public Officials.

14. In connection with the content of the codes of conduct, the majority of responses indicated that they included provisions on the following general principles and issues: loyalty, efficiency, effectiveness, integrity, fairness, impartiality, undue preferential treatment for

any group of individuals, discrimination, abuse of authority and gifts and benefits.

15. Regarding the applicability of the codes of conduct, most States noted that they had comprehensive codes of conduct for all categories of public official.[5] There were specific codes of conduct applicable only to high-level officials in Algeria, Angola, Germany, South Africa and Uruguay, only to medium-level officials in the Dominican Republic, Germany, Guyana and South Africa and only to low-level officials in Angola, Germany and South Africa.

16. Several States indicated that they had codes of conduct for specific categories of public official,[6] such as: (a) members of the judiciary, including prosecutors;[7] (b) members of the judiciary, excluding prosecutors;[8] (c) prosecutors;[9] (d) police officers;[10] (e) prison officers;[11] (f) tax officers;[12] (g) high-ranking military officers;[13] and (h) politicians.[14]

17. Most of the States that had codes of conduct for specific categories of public official stated that the legal ground for those codes lay both in compliance with constitutional law and in administrative policy.[15] On the other hand, in some States such specific codes had been enacted to comply with constitutional law requirements,[16] while in others they were part of national administrative policies.[17] Canada,[18] Germany and Qatar indicated "other reasons" as the basis for their codes.

18. Algeria, Angola, Cuba, Hungary, Italy and New Zealand reported that their national administration provided each public official with a copy of the relevant codes of conduct, w ile Finland, Slovenia, Switzerland and Uruguay provided public officials with a booklet on their duties and obligations. Bangladesh, Belarus, Brunei Darussalam, Burundi, Canada, the Dominican Republic, Germany, Iraq, Japan, Malaysia, Malta, Myanmar, the Republic of Korea and South Africa indicated that their national administration gave each public official both a copy of the relevant codes of conduct and a booklet on duties and obligations.

19. Almost half of the responding States pointed out that their national administration provided public officials with training in ethics and professional behaviour.[19] The training lasted between 1 and 8 days in Belarus, Brunei Darussalam, the Central African Republic, Cyprus, Hungary, Japan, Lithuania, Malta, Mexico, Peru, the Republic of Korea, Slovenia and South Africa; between 9 and 15 days in the Central African Republic; and between 16 and 30 days in Myanmar. Algeria, Angola,[20] Bangladesh,[21] Burundi, Cuba,[22] Germany,[23] Iraq[24] and Thailand[25] indicated that the training in ethics and professional behaviour organized by their respective national administrations had different lengths of time.

20. In connection with the frequency of such training, Angola, Brunei Darussalam, Hungary, Lithuania and Slovenia indicated that it was provided once at the beginning of service, whereas in Myanmar and South Africa it was given twice and in Bangladesh, Belarus, Burundi, the Central African Republic, Egypt, Germany, Iraq, Japan, Malaysia, Malta, Mexico,[26] Peru[27] and the Republic of Korea[28] more than twice.

21. Colombia indicated that although it was normally the task of the individual institutions and office to provide training on matters of ethics and professional behaviour, it had become a policy of the Government to arrange, through the Presidential Programme to Combat Corruption, for the development of teaching tools and methods to encourage public officials to consider and reflect on questions of ethics, morals and values that were relevant to public service.

22. Japan reported that training in ethics was included in administrative training courses and other courses conducted by the National Police Agency for officials from all ministries and agencies. The National Police Agency had developed and conducted special training courses in ethics, which lasted two days for officials and three days for instructors, in order to encourage training in ethics in ministries and agencies. Furthermore, the Agency had newly introduced the Administrative Executive Forum, which was a special training course in ethics for executives from all ministries and agencies. All appointees who had passed the level I recruitment examination were requested to participate in the training course, which included a curriculum on ethics (about one full day). Additionally, freshmen who were expected to become executives in the administration had to participate in a nine-week training course, which included training in ethics lasting several days.

23. Angola, Bangladesh, Belarus, Brunei Darussalam, Burundi, Egypt, Guyana, Hungary, Iraq, Japan, Lithuania, Malaysia, Malta, Mexico, the Republic of Korea, South Africa, Thailand and

Uruguay reported that their relevant national authorities had launched a campaign to inform the public about the provisions contained in the codes of conduct for public officials. Angola, Argentina, Bangladesh, Brunei Darussalam, Burundi, Canada,[29] Chile, Colombia,[30] the Czech Republic, Egypt, El Salvador, Haiti, Iraq, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, the Republic of Korea, Slovenia and South Africa indicated that there were plans in their country to introduce new codes of conduct or to improve the existing ones.

24. Finally, a majority of States replied that their public administration required an oath from public officials when they commenced their duties.[31]

B. Measures to ensure accountability

25. A majority of countries reported that their domestic laws or administrative policies included regulations ensuring accountability for action taken and decisions made by public officials in the performance of their duties[32] and that under domestic laws or administrative policies public officials were required to substantiate the administrative decisions or actions taken that affected the interests of individual citizens.[33]

26. In half of the responding countries, domestic laws or administrative policies, while safeguarding due process, envisaged disciplinary measures for violations of both regulations and codes of conduct.[34] In Belgium, Bolivia, Chile, the Congo, Costa Rica, Ecuador, Egypt, Finland, Greece, Hungary, Italy, Mexico, Norway, Poland, the Republic of Korea, Saudi Arabia, Slovenia and Switzerland, such disciplinary measures were foreseen only for violations of regulations, while in Guyana and Lebanon only for violations of codes of conduct.

27. Provisions for disciplinary measures covered the following types of illegal or unethical behaviour:[35] (a) removing or destroying documents, deeds or any other article to which public officials had access by virtue of their office;[36] (b) attempting to remove or destroy documents, deeds or any other article to which public officials had access by virtue of their office;[37] (c) removing public or private funds to which public officials had access by virtue of their office;[38] (d) attempting to remove public or private funds to which public officials had access by virtue of their office;[39] (e) using, while in office or even after, confidential information to which public officials had access by virtue of their office;[40] and (f) accepting, directly or indirectly, a gift or any other benefit that might place public officials under a moral obligation to accord preferential or special treatment.[41]

28. In Belarus, Belgium, Bolivia, Chile, the Congo, Costa Rica, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Greece, Guatemala, Guyana, Hungary, Italy, Lebanon, Mali, Malta, Mexico, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, Sweden, Switzerland and Uruguay, the measures to ensure accountability and effective disciplinary action were incorporated into a law, in Antigua and Barbuda they appeared in a code of conduct, while in Algeria, Angola, Argentina, Bangladesh, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, Cuba, Germany, Iraq, Japan, Lithuania, Malaysia, Malta, Myanmar, South Africa and Thailand they were incorporated into both a law and a code of conduct.[42]

C. Conflict of interest and disqualification

29. In connection with the issue of conflict of interest and disqualification, a majority of States indicated that their domestic laws or administrative policies included specific measures against the improper use by public officials of: (a) their position;[43] (b) their influence;[44] and (c) their knowledge.[45] Likewise, specific measures against the use by public officials of their official authority for the improper advancement of: (a) their own interests,[46] (b) their family's personal interests;[47] and (c) their financial interests[48] were foreseen by the domestic laws or administrative policies of most of the responding States.

30. Several States also indicated that under their domestic legal or administrative systems public officials were required, if possible conflicts of interests arose,[49] to declare: (a) business or commercial interests;[50] (b) financial interests;[51] and (c) activities undertaken for financial gain.[52]

31. Brunei Darussalam, Burundi, Canada,[53] Colombia, Germany, Italy, Japan, Lebanon, Lithuania, Mali, Malta, Mexico, Peru, Poland,[54] Republic of Korea, South Africa and Uruguay reported having

specific provisions regulating the case of public officials obtaining or receiving a shareholding or employment of whatsoever nature in a public or private enterprise over which they had had supervision or control by virtue of their office during a period of five years from the date of termination of such office (except in the case of a shareholding in the capital of a company quoted on the stock exchange or in that of capital received by inheritance).

32. Measures designed to ensure that public officials after leaving their official positions would not take improper advantage of their previous office were included in the laws or administrative policies of Algeria, Angola, Argentina, Belarus, Burundi, Canada, Colombia, Cuba, Egypt, Germany, Iraq, Japan, Lebanon, Malta, Mexico, New Zealand, the Republic of Korea, Saudi Arabia, Slovenia, Sweden and Uruguay.

33. Regarding the conditions under which the measures designed to ensure that public officials after leaving their official positions would not take improper advantage of their previous office applied, Angola indicated that if a public official ceased to exercise his or her official function, all his or her previous rights and privileges also ceased and he or she was no longer entitled to them.

34. Argentina noted that the aforementioned conditions were regulated by article 15 of Law 25.188 on ethics in the public service. In Canada, in order to ensure that after leaving their official positions public officials did not take improper advantage of their previous office, it was established that public officials would not: (a) use information not publicly available; (b) accept employment with an entity with which the individual had direct and significant dealings within one year prior to leaving office; and (c) make representations for or on behalf of any other person with which they had had direct and significant official dealings during a period of one year immediately prior to leaving office.

35. In Colombia, after leaving public office, officials were subject to certain disqualifications, such as: (a) they could not serve as advisers or consultants on a professional basis in any of the areas belonging to the competence of their former office; and (b) they could not participate in contracting arrangements, competitive bidding or invitations to tender if they were formerly members of the board of directors of the office or agency to which they belonged. Those restrictions were backed up by article 2 (a) of Law No. 80 of 1993 on administrative recruitment.

36. Cuba indicated that public officials remained subject to certain binding restrictions for periods of time that varied with the positions held. In Egypt, there was legislation to combat public service corruption, whether during or after service. This was in accordance with the Penal Code's provisions for the punishment of bribery and related crimes, for the protection of public funds and for criminalizing illegitimate income received by a public official as a result of abuse of position during or after the service or by the wife or dependent minors of the person subject to that Code.

37. Germany indicated that also when civil tenure came to an end, it would be a breach of duty if a civil servant violated his duty to maintain official confidentiality, if he or she failed to give notice of an activity requiring notice to be given or violated a prohibition imposed by the competent service authority in respect of performance of functions or improperly accepted rewards and gifts.

38. In Japan, a public official was prohibited, for a period of two years after leaving the service, from accepting or serving in a position with a profit-making enterprise that involved a close connection with any agency of the State with which such official was formerly employed within five years prior to separation from service (art. 103, sect. 2, of the National Public Service Law). In Lebanon, measures included the prohibition of the disclosure of official information and the prohibition for public officials, for five years after separation from service, from being employed in an agency that used to be under his or her control.

39. In Lithuania, measures were applied in order to protect confidential information. Malta indicated that, according to the Official Secrets Ordinance of 1923 (last amended in 1996), the Estacode of 1968 (last amended in 1998, the management manual of the public service) and the Code of Ethics of 1994, for employees in the public sector it was an offence if a public official took improper advantage of his public office, even after he had left the service. Sanctions could be taken against the persons involved through the courts of law.

40. In Mexico, the Federal Law on Responsibilities of Public Officials established in article 88,

paragraphs 1, 3 and 4, that in the exercise of their office or in the performance of their official duties or assigned tasks and for one year thereafter, public officials might not solicit, accept or receive, directly or through an intermediary, money or other gift, service, office, duty or task for themselves or for their immediate family members or for third parties with whom they had professional, work-related or business relationships or for associations or companies to which they belonged or had belonged, or which emanated from any person whose professional, business or industrial activities were directly linked with or regulated or supervised by the public official in the exercise of his or her office or the performance of his or her official duties or assigned tasks, which would cause a conflict of interest. The Law also established that public officials might not, under any circumstances, receive from such persons securities, real estate or assignments of rights in proceedings or disputes to settle issues of title to ownership of any kind of property. Lastly, acts committed by public officials in violation of the above-mentioned provisions were punishable as acts of corruption and public officials were liable to penalties in accordance with criminal law.

41. New Zealand indicated that measures affecting public officials after leaving their official positions were a matter for individual departments and their employment practices.

42. In the Republic of Korea, pursuant to the Public Officials Ethics Act, a public official, who was required to register his or her assets under the same Act, was prohibited, for two years after retirement, from being employed in a private company that engaged in a business related to the one(s) that he or she had dealt with within two years before retirement.

43. In Slovenia, some special regulations forbade certain categories of public officials to carry out similar work as they had done in their previous office for a certain period of time after the termination of employment (usually two years). This applied, for example, to customs officers, public prosecutors, police officers, deputies and judges.

44. Saudi Arabia indicated that, under Islamic law, improper advantages were unacceptable, whether during or after service. Even if an official could not be held accountable for such advantages under applicable regulations, he or she could, nevertheless, be held accountable for them under Islamic law, since the latter was the basis for the application of all regulations and nothing contradicting it could be adopted. In Sweden, the conditions under which the measures designed to ensure that public officials after leaving their official positions did not take improper advantage of their previous office were contained in chapter 20, sections 2 and 3, of the Penal Code, dealing respectively with taking a bribe and with breach of professional confidentiality.

45. As far as the legal basis for the measures on conflict of interest and disqualification was concerned, several States reported that they were incorporated into a law.[55] New Zealand indicated they were included in a code of conduct, while in Algeria, Angola, Argentina, Bangladesh, Belarus, Brunei Darussalam, Burundi, Canada, Cuba, Germany, Hungary, Iraq, Japan, Lebanon, Lithuania, Malaysia, Malta, Peru, Slovenia, South Africa and Thailand, such measures were embodied in both a law and a code of conduct.

D. Disclosure of assets

46. Public officials were required to disclose their assets, liabilities and copies of their tax returns in a majority of the States responding.[56] Only a few—Belarus, Brunei Darussalam, Colombia, Egypt, Greece, Guatemala, Iraq, Italy, Lebanon, Malaysia[57] and South Africa—indicated that such a requirement was foreseen for public officials at all levels.[58] Argentina, Bangladesh, Belgium, Burundi, Canada,[59] Costa Rica, Egypt, El Salvador, Finland, Guyana, Haiti, Hungary, Iraq, Japan, Lebanon, Lithuania, Mali,[60] Norway,[61] Peru, Poland, the Republic of Korea, Thailand and Uruguay, on the other hand, noted that only public officials at higher levels in the administration or public officials who might be more vulnerable because of their position were subject to the above requirement. A number of States also responded that their domestic laws or administrative policies included measures requiring spouses and/or dependants of public officials to disclose their assets, liabilities and copies of tax returns.[62]

47. Regarding the existence of an appropriate body to monitor and evaluate the disclosure of assets, liabilities and copies of tax returns by public officials, half of the States responding indicated the existence of such a body.[63] In Bangladesh, Belarus, Brunei Darussalam,

Chile, Greece, Guyana, Iraq, Malaysia, Poland, the Republic of Korea and South Africa, the monitoring and evaluating body was a disciplinary council, in Belarus and Lebanon it was a civil court and in Cuba, Greece, Lebanon and Thailand a criminal court.

48. Costa Rica indicated that the functions of supervising the declarations of assets and tax declarations of public officials were responsibilities that were shared by two different authorities. In the first place, the Office of the Comptroller-General of the Republic, which had constitutional status and was attached to the Legislative Assembly as an auxiliary institution of the latter, under the Law on Illicit Enrichment of Public Servants, was also responsible for keeping a record of the sworn declaration of assets of the public servants required to make such a declaration. The second authority was the Office of Direct Taxation, a body constituted by the Ministry of Finance and entrusted with the tasks of supervising and evaluating the tax declarations of all taxpayers, not only public officials.

49. A majority of States responded that their domestic laws or administrative policies included specific provisions on illicit enrichment.[64] In Angola, Bolivia, Chile, the Czech Republic, Guyana, Lebanon, Norway, Saudi Arabia and Uruguay, such provisions were of a civil nature. In Argentina, Bangladesh, Belarus, Canada, Colombia, Costa Rica, El Salvador, Greece, Haiti, Hungary, Iraq, Malaysia, Mexico, New Zealand, Peru, Poland, the Republic of Korea, South Africa, Switzerland and Thailand, they were of an administrative nature. In Brunei Darussalam, Burundi, the Congo, Cuba, Cyprus, Germany, Lithuania, Malta, Myanmar and Poland, the provisions on illicit enrichment were of both a civil and an administrative nature.[65]

50. Most of the States that had specific provisions on illicit enrichment noted that their domestic laws or administrative policies provided for the existence of an appropriate body to monitor the illicit enrichment of public officials.[66]

51. In Brunei Darussalam, Chile, Guyana, Iraq, Malaysia, Poland, the Republic of Korea and South Africa, the monitoring function was performed by a disciplinary council, in Burundi, El Salvador and Saudi Arabia by a civil court and in Bangladesh, Colombia, Cuba, Egypt, Mexico, New Zealand and Thailand by a criminal court.

52. In Belarus, the monitoring of illicit enrichment by public officials was undertaken by both a disciplinary council and a civil court, in Angola and in Lebanon by both civil and criminal courts, in Cyprus and Greece by disciplinary councils and criminal courts and in Germany[67] and Myanmar it was undertaken jointly by disciplinary councils and civil and criminal courts.

53. Argentina indicated that the function of monitoring the illicit enrichment of public officials was performed by the Anti-Corruption Agency, established by Law 25.233. In Bolivia, under the regulations on accountability in the civil service (D.S. 233118-A), it was the responsibility of internal bodies to determine accountability and, where cases of administrative liability were identified, to forward the matter to the Office of the Auditor-General of the Republic for institution of the correct procedures.

54. In Costa Rica, the Office of the Comptroller-General of the Republic, a body for monitoring and countering the crime of illicit enrichment, existed only for senior public officials and officials who might be more vulnerable because of the post that they held. In Hungary, the body in charge of monitoring the illicit enrichment of public officials was a tax authority.

55. In connection with the question on the legal nature of the measures on disclosure of assets and illicit enrichment, most States reported that such measures were incorporated into a law;[68] in Antigua and Barbuda they appeared in the code of conduct; and in Angola, Argentina, Bangladesh, Brunei Darussalam, Canada, Colombia, Cuba, Germany, Malaysia and South Africa they appeared in both a law and a code of conduct.

E. Acceptance of gifts and other favours

56. The solicitation and the acceptance of any gift that might influence the exercise of functions of public officials and the performance of their duties was regulated by the laws or administrative policies of the large majority of the responding countries.[69] While in many countries the related provisions were incorporated into a law,[70] in Bangladesh, Malta and Thailand they were contained in a code of conduct. In Angola, Argentina, Brunei Darussalam, Canada, Colombia, Cuba, Germany, Hungary, Japan, Lithuania, Malaysia, Myanmar, New Zealand, Slovenia and South

Africa, there were relevant provisions in both laws and codes of conduct.

F. Confidential information

57. Almost all the countries indicated that their domestic laws or administrative policies required public officials to ensure the professional secrecy of matters of a confidential nature[71] and provided for disciplinary sanctions if the obligation was not fulfilled.[72]

58. In several States such restrictions applied also after separation from service:[73] for one year in Lithuania and Mexico, for a period between two and three years in Peru and for more than three years in Algeria, Angola, Belarus, Belgium, Brunei Darussalam, Burundi, Colombia, the Congo, Cuba, Finland, Germany, Iraq, Japan, Lebanon, Malaysia, Malta, Myanmar, Norway, Poland, the Republic of Korea, Saudi Arabia, Slovenia, Sweden, Switzerland and Uruguay.

59. In a majority of States, the above measures to protect confidential information were incorporated into a law,[74] while in Argentina and New Zealand they were contained in a code of conduct. In Angola, Bangladesh, Belarus, Brunei Darussalam, Burundi, Canada, Cuba, Germany, Hungary, Iraq, Lithuania, Malaysia, Malta, Myanmar, Slovenia and South Africa, these measures were embodied in both a law and a code of conduct.

G. Political activity

60. The analysis of the replies indicates that in numerous countries the political activity of public officials, when performed outside the scope of their office, was regulated by law.[75] Brunei Darussalam, Canada, Cuba, Myanmar and New Zealand indicated that the political activity of public officials was regulated in a code of conduct, while Angola, Bangladesh, Belarus, Burundi, Colombia, Germany, Hungary, Lithuania, Malta, the Republic of Korea, Slovenia and South Africa reported that it was regulated both by law and a code of conduct.

61. The information provided also revealed that other activities performed by public officials outside the scope of their office were regulated by law in Angola, Belgium, Bolivia, Chile, Costa Rica, Ecuador, Egypt, El Salvador, Finland, Greece, Guatemala, Guyana, Iraq, Japan, Lebanon, Mexico, Peru, Poland, Saudi Arabia and Uruguay; by a code of conduct in Canada, Malta and New Zealand; and by both a law and codes of conduct in Algeria, Bangladesh, Brunei Darussalam, Burundi, Colombia, Cuba, Germany, Hungary, Italy, Lithuania, Malaysia, the Republic of Korea, Slovenia, South Africa and Thailand.

H. National policies concerning codes of ethics and conduct of public officials

62. Argentina indicated that within the public administration the issue of ethics was regulated by the code of ethics in the public service (Decree No. 41/99) and by Law 25.188 on ethics in the performance of public service. An Anti-Corruption Agency had also been established.

63. Belgium indicated that at the initiative of the Secretary-General of the Ministry of Civil Service, a draft code of ethics had been prepared for the personnel of the Federal Government administration. The Minister of Civil Service would shortly submit the draft code to the Council of Ministers and propose to the Council that the draft be the subject of a consultation process to be conducted between the personnel concerned and the public prior to its final adoption.

64. Bolivia noted that, on 27 October 1999, the Government had adopted the Civil Service Act, which dealt with various aspects covered in the questionnaire, and that the Act provided for the enactment of regulations that were intended to fill any remaining gaps. In Brunei Darussalam, work ethics had been introduced in the public service in 1996 and in the General Orders as early as 1961.

65. Colombia indicated that Presidential Decree No. 09 of 24 December 1999 outlined rules for the implementation of government policy to combat corruption and called upon all national offices and agencies to adhere to that policy. For that purpose, it gave the Presidential Programme to Combat Corruption powers to provide relevant advice and to coordinate, monitor and evaluate implementation of the actions and strategies decided upon for that purpose. As regards the prevention of corruption, the

Presidential Programme to Combat Corruption had prepared a guide designed to promote the ethical values of public officials. It was up to the individual agencies to implement the recommendations contained in the guide, as part of the Government's strategy of strengthening forms of thinking and behaviour consistent with the principles that should guide the public service. The Programme provided support to the Administration Department of the Public Service by developing an "ethics component" that was introduced as one element in the National Public Service Training and Instruction Plan.

66. Costa Rica reported that two legislative bills were currently under study in the area of ethics and conduct of public officials. The first was the Bill on the Code of Duties and Standards of Conduct of the Public Servant (legislative file No. 12377) and the second the Bill against Corruption and Illicit Enrichment in the Public Administration.

67. Cuba noted that the national policy of the Government had always been to continually promote all necessary measures aimed at ensuring that officials at the various levels of the hierarchy of the public administration discharged their functions with integrity. To that end, the Constitution proclaimed the principle of respect for the law by all citizens, regardless of status. In addition, the Penal Code provided severe penalties, including confiscation of all assets, for those guilty of the offences of misappropriation, fraud, abuse of position and other such offences. Severe penalties were also provided for illicit enrichment.

68. In accordance with United Nations guidelines, the Executive Committee of the Council of Ministers of Cuba had adopted Decision No. 3050 of 17 July 1996 on a Code of Ethics for Public Officials and Officers of the State, which set out the principles and elements on which the ethics and conduct of persons occupying such posts of responsibility should be based. The Code, to which each one of the thousands of Cuban public officials and functionaries had subscribed in a solemn ceremony and to which incoming officials would also subscribe, was upgraded to the status of a binding judicial norm by Decree Law No. 196 of 15 October 1999. The Code clearly established the duties and obligations of each public official, manager and officer.

69. Cuba added that Decree-Law No. 141 of 8 September 1993 specifically prohibited public officials from holding certain offices or positions that were considered incompatible with the post of public official, officer of the State, prosecutor or judge. Moreover, prosecutors and judges at all levels were obliged to devote themselves exclusively to their respective functions, with teaching being the only exception. The same restriction applied to serving military personnel and to officials of the Ministry of the Interior, including all officers of every rank. Those rules were given the widest possible publicity in the press and were published in the *Official Gazette of the Republic*. Relevant studies were continuing, with a view to the gradual incorporation of those experiences of the international community that were compatible with the legal traditions of Cuba in the area.

70. The Czech Republic reported that a law on the service of state civil employees was in preparation, while Ecuador indicated that it had taken a major step forward in strengthening the national policy on the ethics and conduct of public officials with the adoption of the 1998 Constitution. However, it noted that neither the Constitution nor the relevant law had proved sufficient to halt corruption or rectify the lack of ethical values. Therefore, the Congress was discussing new laws directed towards meeting those needs.

71. Egypt reported that the legal framework for combating functional corruption in the country was an integrated model for containing the various forms of corruption. The most important elements of the legal framework to combat corruption were as follows: (a) the administrative and judicial control over the performance of administrations; (b) a legislative framework to combat corruption; (c) judicial authorities to combat functional corruption; and (d) parliamentary control over the actions of the executive authority.

72. Administrative and judicial control over the performance of the administration was exercised by means of internal control within the administration itself and externally by the Central Auditing Organization, the central authority for organization and administration, and the Administrative Control Authority. External control over administrative work was carried out by a specialized organ, the Administrative Prosecution Authority. External control over public officials was exercised by judicial

committees for the control of illicit gain and enrichment by public officials.

73. The legislative framework to combat corruption was provided by the Penal Code, which criminalized bribery and related crimes, by the provisions concerning the protection of public funds and by the provisions criminalizing illicit gains by public officials. The most important judicial authorities to combat functional corruption were the specialized public prosecution authorities, such as the higher state security prosecution office, the higher public funds prosecution office, the illicit gain administration, the state security courts, the disciplinary courts and the administrative prosecution office.

74. El Salvador indicated that within the framework of the 1992 peace agreements, the State was harmonizing its domestic legislation with the Constitution and international obligations and standards concerning the ethics and conduct of public officials. Examples of this were: (a) a new law on tendering (repealing a law of 1945); (b) the Code of Police Conduct (including the related law of 1993); (c) the reform of the law on probity; and (d) the signature and ratification of the Inter-American Convention against Corruption.[76]

75. Germany reported that, in order to ensure proper conduct on the part of public service staff, the administrations at the federal, *Länder* and local levels had taken a large number of organizational measures based on the principles and provisions regulating the public service. For the ministries and the administrative authorities of the Federation, those measures had been specially compiled in a package for the purpose of fighting corruption, the Directive of the Federal Government for the Prevention of Corruption in the Federal Administration, of 17 June 1998.

76. The following measures were among the preventive measures contained in the Directive: determination of service posts at risk of corruption; analysis of the risks posed by service posts at special risk of corruption; principle of wide participation; transparency through written presentation of the reasons for decisions taken; strengthening of internal control in the authority concerned through internal revision; taking particular care in the selection of staff for jobs at risk of corruption; sensitization instruction, training and continuing training of staff; strengthening supervisory authority for superiors; staff rotation in respect of service posts at special risk of corruption; designation of a person who could be approached by both staff and ordinary members of the public on precautions against corruption; strict observance of the prescribed provisions on the award of public contracts; separation of planning, award and settlement of public contracts (as far as this was possible and made sense); and exclusion of tenders from competition where there had been serious misconduct raising the question of their reliability.

77. Parallel to the text of the Directive, a series of recommendations were also drawn up. They were supposed to facilitate application of the individual measures and, therefore, full implementation of the Directive. The recommendations comprise, in particular, a Code of Conduct against Corruption, intended to give staff the certainty of reacting in an appropriate way to incidents raising the suspicion of corruption, as well as Guidelines for Superiors.

78. Greece indicated that the Government was studying the possibility of creating a permanent ethics committee to coordinate the measures to be taken in connection with ethics in public office and the fight against corruption.

79. Haiti noted that, although there was no national policy on the conduct and behaviour of public officials, there were nevertheless constitutional and legal provisions that constituted a legislative framework allowing such a policy to be formulated.

80. Iraq stressed the fact that the national policy on ethics and conduct of public officials was aimed at ensuring the objectives of public office, namely, service for all, without trading in public office, using it as a means of illicit gain or a means of personal influence for the public official or other persons.

81. Italy reported that there were two legislative decrees pending concerning the ethics and conduct of public officials. The first, already approved by the Chamber of Deputies and under examination by the Senate, concerned the establishment of a property register of all public officials providing for a specific supervisory body (Legislative Decree S3015-B). The second concerned conflict of interest and incompatibilities for those in public office (Legislative Decree S3236, approved by the Chamber and under examination by the Commission for Constitutional Affairs of the Senate).

82. Malaysia indicated that a Special Cabinet Committee on Management Integrity in the Government, chaired by the Deputy Prime Minister, had been set up in 1998. The objective of the Committee was to ensure a Government and public service that were efficient, disciplined and high in integrity, through the practice of good values and resolution of weaknesses, in particular in the area of financial management and public management, as well as the management of disciplinary cases, corruption and abuse of power.

83. Malta noted that the Official Secrets Ordinance, the Estacode and the Code of Ethics for Employees in the Public Sector gave detailed guidelines on the ethics and conduct of public officials. Those guidelines ranged from conflict of interest to personal and professional behaviour, use of official information, facilities and equipment, outside employment and political participation. The Constitution of Malta disqualified persons holding public office from membership in the House of Representatives.

84. Mexico indicated that the national policy on ethics and conduct of public officials was enshrined in the Political Constitution and in the Federal Law on Responsibilities of Public Officials. In a State governed by the rule of law, the scope of action of the public authorities was determined by the law and agents of the State were accountable before the law for the exercise of powers expressly conferred upon them. The rule of law demanded that public officials should be accountable. Their accountability was not manifested in practice when the obligations imposed upon them were merely declarative, when they were not enforceable, when there was impunity or when the penalties for failure to fulfil obligations were insufficient. Nor was there accountability when the person affected had no easy, practical or effective means of ensuring fulfilment of the obligations of public officials. In the interests of ensuring that public officials showed honesty, loyalty, impartiality and efficiency in their conduct, their political and administrative obligations were defended, while there were penalties whenever there was a failure to fulfil those obligations.

85. Criminal responsibility was a primary prerequisite for democracy. All citizens were equal before the law and there was no room for special jurisdiction or courts. Public officials who committed a crime could be tried by an ordinary court under criminal law in the same way as any other citizen and without any further formal requirement, in the case of public officials enjoying exemptions, than a declaration of reasonable cause made by the Chamber of Deputies (lower house).

86. As far as civil liability of public officials was concerned, the applicable provisions were those of ordinary law. The bases of administrative liability were established, according to which such liability was incurred through acts or omissions that violated the principles of legality, honesty, impartiality and efficiency by which the public administration was governed and good public service guaranteed. The administrative procedure was independent of the political and criminal procedures. It afforded the defendant the constitutional guarantees.

87. The Office of the Auditor-General was the central, specialized authority for supervising compliance with the obligations of public officials, for identifying the degree of administrative liability incurred for non-compliance and for imposing disciplinary sanctions. Those sanctions could consist of the dismissal of any public official not appointed by the President of the Republic, a financial penalty in the amount of three times the economic gain obtained or the damage caused by the illicit act or disqualification by court decision from further exercise of public office or from the performance of public duties or tasks for a period of up to 20 years. Each government department was required to establish special bodies to which the citizen must have easy access for the submission of complaints and reports regarding failure on the part of public officials to fulfil their obligations.

88. Disciplinary measures were subject to constitutional guarantees: the authorities concerned must act with due speed and impartiality, while public officials must be given the opportunity for a proper hearing. Administrative means were available for optional exhaustion of remedies, allowing punitive measures to be contested without prejudice to the jurisdiction of the Federal Fiscal Court, in order to permit hearings to be held in case of disputes resulting from disciplinary measures and to enable progress to be made in the gradual process of transfer to a proper court of administrative justice.

89. The requirement of annual submissions of a declaration of personal wealth was stipulated so that

the competent authority could, in the course of the official's term of office, make the necessary checks. A deeply ingrained practice that generated corruption and compromised the impartiality of good public service was also regulated, namely, by prohibiting public officials from receiving gifts and courtesies from persons having some relationship to the powers with which they were invested. Violation of that rule was deemed equivalent to an act of corruption.

90. Norway noted that the national policy was that it was a managerial responsibility to promote continuously the issues of ethics and professional behaviour in each and every department. How to achieve that goal was left to the individual manager and agency.

91. The criminal law of Panama established penalties for the offences of embezzlement, abuse of office and extortion. The offence for which penalties were most commonly imposed was embezzlement. There was a lack of legislation, administrative standards and codes of conduct providing for disciplinary measures to prevent and penalize those breaches of ethics in the discharge of public duties. Panama indicated that recently an amendment had been made in the legislation requiring the declaration of assets prior to or after the discharge of certain public duties, but only to the effect that such declaration should be made in a public record. Panama also stressed the need to tackle with determination and energy the issue of politicians responsible for managing public administration, as well as the importance of carrying out educational campaigns on ethical values of responsibility in the workplace.

92. The Republic of Korea indicated that the Government was planning to revise the Public Officials Ethics Act, which provided for the registration of assets, the restriction of employment of retired officials and the declaration of gifts, to expand the categories of public officials required to register assets and to increase the requisites for the restriction of employment of retired officials.

93. Saudi Arabia underlined that the ethics and conduct of public officials should conform, in the first place, with Islamic rules derived from the Holy Koran and the Sunna. A person was accountable for any contravention of the Koran or the Sunna if such contravention was deleterious to public interests or to the interests of others. Furthermore, all citizens, whether officials or not, should abide by the regulations laid down by the State in the interest of citizens. Special as well as general rules had been adopted to address any violation of those regulations. Responsibility for supervising the application of such rules had been assigned in accordance with the competence of each authority and the nature of each conduct.

94. South Africa indicated that the Government was in the process of developing an accountability system to prevent corruption in the public service.

III. Conclusions

95. Although it is difficult to ascertain whether the adoption by the General Assembly of the International Code of Conduct for Public Officials has had a direct impact on domestic legislation, the analysis of the replies to the survey indicates that the main principles and provisions embodied in the International Code of Conduct are reflected, to different degrees and with different modalities, in the implementation of legislation at the national level in many States.

96. The signature and ratification of the existing international legal instruments against corruption, which have been negotiated and adopted under the aegis of different intergovernmental organizations in recent years and which refer to the principles of the International Code of Conduct, will undoubtedly foster and strengthen its application at the domestic level.

97. It is also to be hoped that the instrument will inspire the negotiations of the United Nations Convention against Corruption, which started in January 2002.

Notes

[1] Algeria, Angola, Argentina, Bangladesh, Belarus, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, the Congo, Cuba, Cyprus, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Guyana, Haiti, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Malta, Mexico, Myanmar, New Zealand, Peru, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland, Thailand and Uruguay.

[2] Algeria, Angola, Argentina, Bangladesh, Belarus, Brunei Darussalam, Burundi, the Central African Republic, Colombia, the Congo, Cuba, Cyprus, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Guyana, Haiti, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Malta, Mexico, Myanmar, Peru, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland and Uruguay.

[3] Algeria, Angola, Bangladesh, Brunei Darussalam, Canada, Cyprus, the Dominican Republic, Ecuador, Egypt, El Salvador, Germany, Haiti, Iraq, Japan, Lebanon, Malaysia, Malta, Mexico, Myanmar, New Zealand, the Republic of Korea, Saudi Arabia and Switzerland.

[4] Angola, Argentina, Burundi, Colombia, Cuba, Egypt, Finland, Hungary and South Africa.

[5] Algeria, Argentina, Bangladesh, Belarus, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, the Congo, Cuba, the Czech Republic, Egypt, El Salvador, Finland, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Malta, Mexico, Myanmar, New Zealand, Peru, the Republic of Korea, Saudi Arabia, South Africa, Switzerland and Thailand. Germany indicated there was no single code of conduct for public service staff in Germany; instead the ethical principles applying to the public service were set down in a large number of provisions, not least because of the differing configuration of the various employment relationships.

[6] New Zealand indicated that specific codes of conduct were a matter for the relevant individual departments or professional bodies.

[7] Algeria, Angola, Antigua and Barbuda, Brunei Darussalam, Burundi, the Central African Republic, the Congo, Egypt, El Salvador, Italy, Lithuania, Malaysia, Mexico, Myanmar, Saudi Arabia, Switzerland and Uruguay.

[8] Bangladesh, Belarus, Canada, the Czech Republic, the Dominican Republic, El Salvador, Germany, Guyana, Iraq, Japan, Lithuania, Mexico, Myanmar and Slovenia.

[9] Bangladesh, Burundi, the Czech Republic, Iraq, Lithuania, Malaysia, Mexico, Myanmar, New Zealand, Qatar, the Republic of Korea and Slovenia.

[10] Algeria, Angola, Antigua and Barbuda, Argentina, Bangladesh, Brunei Darussalam, Burundi, Canada, Colombia, the Czech Republic, the Dominican Republic, Egypt, El Salvador, Finland, Germany, Guyana, Haiti, Iraq, Italy, Japan, Lithuania, Malaysia, Malta, Mexico, Myanmar, Peru, Qatar, the Republic of Korea, Saudi Arabia, Slovenia, South Africa and Switzerland.

[11] Algeria, Angola, Antigua and Barbuda, Argentina, Bangladesh, Brunei Darussalam, Burundi, Colombia, the Czech Republic, the Dominican Republic, Egypt, Iraq, Italy, Japan, Lithuania, Malaysia, Malta, Mexico, Myanmar, Qatar, the Republic of Korea, Saudi Arabia, Slovenia, South Africa and Switzerland.

[12] Algeria, Angola, Brunei Darussalam, Burundi, Canada, the Czech Republic, Egypt, El Salvador, Guyana, Hungary, Iraq, Italy, Lebanon, Lithuania, Malaysia, Malta, Mexico, Myanmar, the Republic of Korea, Saudi Arabia, Slovenia, South Africa and Uruguay.

[13] Angola, Argentina, Bangladesh, Brunei Darussalam, Burundi, Canada, Colombia, the Czech Republic, Egypt, El Salvador, Guyana, Iraq, Italy, Lithuania, Malaysia, Malta, Mexico, Myanmar, South Africa and Uruguay.

[14] Algeria, Angola, Burundi, Canada (for the Prime Minister, her or his Cabinet and parliamentary secretaries), the Czech Republic, Egypt, Germany, Guyana, Iraq, Japan, Lithuania, Malaysia, Malta, Mexico, Saudi Arabia, South Africa and Uruguay.

[15] Angola, Bangladesh, Brunei Darussalam, Burundi, the Congo, the Czech Republic, Egypt, El Salvador, Finland, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Malta, the Republic of Korea, Slovenia and South Africa. It must be noted that Italy, Japan and Malta in addition indicated "other reasons" as the legal ground for such specific codes of conduct.

[16] Algeria, Belarus, Colombia, Ecuador, Haiti, Hungary, Mexico, Peru, Switzerland and Uruguay.

[17] Argentina, the Central African Republic, the Dominican Republic, Guyana, Myanmar, New Zealand and Saudi Arabia.

[18] Canada indicated "condition for holding public office".

[19] Algeria, Angola, Bangladesh, Belarus, Brunei Darussalam, Burundi, the Central African Republic, Cuba, Cyprus, Egypt, Finland, Germany, Hungary, Iraq, Japan, Lithuania, Malaysia, Malta, Mexico, Myanmar, Peru, the Republic of Korea, Slovenia, South Africa and Thailand.

[20] Angola indicated that it had a vocational training school the duration of whose courses depended on the level of training and the recipient.

[21] Bangladesh indicated that public officials were given four months' foundation training after entry into service. Subsequently various in-service training courses were given to public officials.

[22] Cuba indicated that training in ethics and professional behaviour was an integral part of the systematic training provided at all levels of instruction throughout the period of service.

[23] Germany indicated that training was not given generally but took place in many branches in the various areas of work. Hence training differed according to careers and career groups. Germany also indicated that as regards the training for civil servants of all career groups, this consisted of imparting the central values of the public service as the basis for state action. In further training of civil servants and employed staff those values were taken up and handled with reference to current manifestations and problems. Training focused on instruction with regard to the fundamental principles of cooperation and leadership, of social competence, as well as of responsible handling of the exercise of office. The frequency of further training was determined in the individual case by the tasks performed.

[24] Iraq indicated that the duration of training courses varied according to the subject and the functional level of participants. They lasted between one week and three months.

[25] In Thailand the length of such training was decided by the Civil Service Commission.

[26] Six times during service.

[27] Peru indicated that training in ethics and professional behaviour was provided to public officials once per month (i.e. 10 hours per month).

[28] Five times during service.

[29] Canada indicated that two provinces and one territory had recently legislated codes of conduct.

[30] Colombia indicated that the aim was to launch a process under which public service departments would formulate new codes governing ethical conduct that were in harmony with modern requirements.

[31] Algeria, Angola, Argentina, Belarus, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile (for ministers), Colombia, Cuba, the Dominican Republic, Ecuador, Egypt (only for particular positions such as the judiciary, police, armed forces and doctors), El Salvador, Germany, Guatemala (in some cases), Hungary, Iraq (in certain public posts), Italy, Japan, Lebanon (in some cases), Lithuania, Malaysia, Mali, Malta, New Zealand, Peru, Qatar, the Republic of Korea and Switzerland.

[32] Algeria, Angola, Argentina, Bangladesh, Belarus, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Guatemala, Guyana, Hungary, Iraq, Italy, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay. New Zealand specified that there was a legal process in place for ensuring accountability for actions taken and decisions made by public officials (for example, actions were open to judicial review in the courts). The chief executive, rather than individual public servants, had overall responsibility for the actions taken and decisions made within his or her department.

[33] Angola, Antigua and Barbuda, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, New Zealand, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay. New Zealand indicated that there was a legal process in place in the country for ensuring accountability for actions taken and decisions made by public officials (for example, actions were open to judicial review in the courts). The chief executive, rather than individual public servants, had overall responsibility for the actions taken and decisions made within his or her department.

[34] Algeria, Angola, Argentina, Bangladesh, Belarus, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, Cuba, Cyprus, El Salvador, Finland, Germany, Iraq, Japan, Lithuania, Malaysia, Mali, Malta, Myanmar, New Zealand, Peru, South Africa, Thailand and Uruguay.

[35] Norway indicated that disciplinary measures might be used against any type of illegal or unethical behaviour that was sufficiently grievous. Norwegian administrative law did not specify types of such behaviour.

[36] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland, Thailand and

Uruguay. New Zealand indicated that provisions for disciplinary measures for the types of illegal or unethical behaviour, as indicated in points (a)-(f) of this paragraph were not expressed but were implied through the general principles of the Code of Conduct. It stressed that, for the most serious cases, an official might also be prosecuted (in criminal law) under section 105 A of the Crimes Act of 1961.

[37] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, Ecuador, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland, Thailand and Uruguay.

[38] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, the Czech Republic, Cyprus, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Haiti, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Panama, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland, Thailand and Uruguay.

[39] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Panama, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland, Thailand and Uruguay.

[40] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland, Thailand and Uruguay.

[41] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Switzerland, Thailand and Uruguay.

[42] New Zealand indicated that the obligations and duties contained in the Code of Conduct would be an express or implied requirement of the employment contract with the employing department.

[43] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[44] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[45] Algeria, Angola, Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Canada, Chile, Colombia, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Malaysia, Malta, Mexico, Myanmar, New Zealand, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, Sweden and Thailand.

[46] Algeria, Angola, Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[47] Angola, Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland,

Germany, Greece, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[48] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Colombia, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[49] Costa Rica indicated that, in view of the fact that in the relevant question of the questionnaire (i.e. question 20) the distinguishing criterion applied was whether "possible conflicts of interest arose", it had to reply in the negative, since in Costa Rica the requirement of the declaration of assets set out in the Law on the Illicit Enrichment of Public Servants was stipulated as an absolutely essential precondition upon assumption of public post—and also upon separation from that post—and was not contingent on whether a conflict of interest arose.

[50] Algeria, Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Burundi, Canada, Colombia, Cyprus, the Czech Republic, Egypt, Finland, Germany, Greece, Guyana, Hungary, Iraq, Italy, Lithuania, Malaysia, Malta, Mexico, Norway, Peru, Poland, South Africa, Sweden, Switzerland, Thailand and Uruguay. Bolivia added that the national legislation had a general provision relating to public officials that referred to conflict of interest (i.e. art. 10 of Law No. 2027, Civil Service Act), which provided the following: "Public servants may not direct, administer, advise, represent or offer paid or unpaid services to individuals or corporate bodies that manage transactions, licences, authorizations, concessions or preferential arrangements of whatsoever type or that aim to conclude contracts of whatsoever nature with entities of the civil service".

[51] Same countries as in footnote 50.

[52] Algeria, Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Burundi, Canada, Colombia, Cuba, Cyprus, the Czech Republic, Egypt, Finland, Germany, Greece, Guyana, Hungary, Iraq, Italy, Lithuania, Malaysia, Malta, Mexico, Norway, Peru, Poland, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[53] Canada indicated that the relevant Code required such an obligation only for senior public servants and public office holders (for a period of one year) and for ministers, including the Prime Minister (for a period of two years).

[54] Poland added that it was only during a period of one year (two years in some specific cases).

[55] Belgium, Bolivia, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Greece, Guatemala, Guyana, Italy, Mexico, Norway, Poland, the Republic of Korea, Saudi Arabia, Sweden, Switzerland and Uruguay.

[56] Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Canada, Colombia, Costa Rica, Cyprus (only assets), Ecuador, Egypt, El Salvador, Greece, Guatemala, Guyana, Haiti, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia (no copies of tax returns were required), Mali, Malta, Mexico, Norway, Peru, Poland, the Republic of Korea, South Africa, Thailand and Uruguay. Canada indicated that public officials were requested to disclose their assets, liabilities and outside activities only when they had some relationship with one's responsibility. No tax returns were required.

[57] No copies of tax returns were required.

[58] Canada indicated that public officials at all levels were requested to disclose their assets, liabilities and outside activities only when they had some relationship with one's responsibility. No tax returns were required.

[59] In Canada no tax returns were required.

[60] The President of the Republic and the ministers.

[61] Public procurement officials and tax officials.

[62] Argentina, Bangladesh, Belarus, Brunei Darussalam, Canada (only for spouses and dependants of ministers and tax returns were not required), Egypt, El Salvador, Greece, Guyana, Iraq, Lebanon, Malaysia (no copies of tax returns were required), Poland, the Republic of Korea, South Africa, Thailand and Uruguay.

[63] Argentina (i.e. the Anti-Corruption Agency, established by Law 25.233), Bangladesh, Belarus, Bolivia, Brunei Darussalam, Canada, Chile, Colombia, Costa Rica, Cuba, Egypt, El Salvador, Greece, Guatemala, Guyana, Iraq, Lebanon, Lithuania, Malaysia, Mexico, Peru, Poland, the Republic of Korea, South Africa, Thailand and Uruguay.

[64] Algeria, Angola, Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Haiti, Hungary, Iraq, Lebanon, Lithuania,

Malaysia, Malta, Mexico, Myanmar, New Zealand, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, South Africa, Switzerland, Thailand and Uruguay.

[65] Bolivia, Canada and Finland indicated that the provisions on illicit enrichment were also of a criminal nature.

[66] Angola, Argentina, Bangladesh, Belarus, Bolivia, Brunei Darussalam, Burundi, Chile, Colombia, Costa Rica, Cuba, Cyprus, Ecuador, Egypt, El Salvador, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Lebanon, Lithuania, Malaysia, Mexico, Myanmar, New Zealand, Peru, Poland, the Republic of Korea, Saudi Arabia, South Africa, Switzerland and Thailand. In Bolivia, under the regulations on accountability in the civil service (D.S. 233118-A), it was the responsibility of internal bodies to determine accountability and, where cases of administrative liability were identified, to forward the matter to the Office of the Auditor-General of the Republic for institution of the correct procedures. In Argentina that function was performed by the Anti-Corruption Agency, established by Law 25.233.

[67] Germany indicated that the monitoring of illicit enrichment of public officials by appropriate bodies was carried out by the Federal Court, or the *Länder* courts of audit; the relevant supervisory authorities; and organizational measures within the authority concerned such as, for instance, internal revision.

[68] Algeria, Belarus, Bolivia, Burundi, Chile, Costa Rica, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Greece, Guatemala, Guyana, Haiti, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Mexico, Myanmar, Norway, Peru, Poland, the Republic of Korea, Thailand and Uruguay.

[69] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Brunei Darussalam, Canada, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Malta, Mexico, Myanmar, New Zealand, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland and Uruguay.

[70] Algeria, Belarus, Belgium, Bolivia, Chile, Costa Rica, Cyprus, the Czech Republic, Ecuador, Egypt, El Salvador, Finland, Greece, Guatemala, Guyana, Iraq, Italy, Lebanon, Mexico, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Sweden, Switzerland and Uruguay.

[71] Algeria, Angola, Argentina, Antigua and Barbuda, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guatemala, Guyana, Haiti, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[72] Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Bolivia, Brunei Darussalam, Burundi, Canada, the Central African Republic, Chile, Colombia, the Congo, Costa Rica, Cuba, Cyprus, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Greece, Guyana, Hungary, Iraq, Italy, Japan, Lebanon, Lithuania, Malaysia, Mali, Malta, Mexico, Myanmar, New Zealand, Norway, Peru, Poland, the Republic of Korea, Saudi Arabia, Slovenia, South Africa, Sweden, Switzerland, Thailand and Uruguay.

[73] Algeria, Angola, Belarus, Belgium, Brunei Darussalam, Burundi, Canada, Colombia, the Congo, Cuba, the Dominican Republic, Finland, Germany, Greece, Hungary, Iraq, Japan, Lebanon, Lithuania, Malaysia, Malta, Mexico, Myanmar, New Zealand, Norway, Poland, the Republic of Korea, Saudi Arabia, Slovenia, Sweden, Switzerland, Thailand and Uruguay.

[74] Algeria, Belgium, Bolivia, the Central African Republic, Chile, the Congo, Costa Rica, Cyprus, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, Finland, Greece, Guatemala, Guyana, Haiti, Italy, Japan, Lebanon, Mexico, Norway, Peru, Poland, Republic of Korea, Saudi Arabia, Sweden, Switzerland, Thailand and Uruguay.

[75] Algeria, Belgium, Bolivia, the Central African Republic, Chile, the Congo, Costa Rica, Cyprus, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, Finland, Greece, Guatemala, Guyana, Haiti, Italy, Japan, Lebanon, Mexico, Norway, Peru, Poland, Switzerland, Thailand and Uruguay.

[76] E/1996/99, annex.

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United Nations standards and norms in crime prevention and criminal justice

Implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions

Report of the Secretary-General**

Addendum

1. An additional response to the survey instrument on the implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions was received from the United States of America, bringing the total number of responding States to 48. The information received from the United States is summarized below.

2. The United States reported that legislation to combat corruption and bribery in international commercial transactions was adopted in 1977 in the form of the Foreign Corrupt Practices Act.[1] Amendments to the Act were made in 1988 and 1998, in order to implement the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). The Act only applied to active bribery, while, under certain circumstances, foreign officials receiving bribes might be prosecuted under the Travel Act or the mail and wire fraud statutes.

3. With regard to the criminalization of bribery of foreign public officials, the United States reported that the Foreign Corrupt Practices Act made the bribery of foreign public officials by nationals, such as individuals, as well as private, public and national corporations, a criminal offence. Further, the Government noted that the bribery of foreign public officials, if committed by a natural person, was punishable with imprisonment of up to five years and a fine of up to US$ 100,000 while fines of up to US$ 2,000,000 were foreseen if the perpetrator was a legal person. Additional forms of civil and

* E/CN.15/2002/1 and Corr.1.

** The response from the United States of America to the survey instrument on the implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, reflected in the present document, was submitted within the prescribed time. However, owing to an oversight by the Secretariat, it was not included in document E/CN.15/2002/6.

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administrative penalties that could be applied included the disbarment from contracting with the United States Government. In the period from 1996 to 1998, five prosecutions for bribery of public officials had been undertaken, all in the year 1998. There was no possibility under United States law to avoid prosecution for such an offence through legal transaction. In all five cases prosecuted in 1998, sentences had been pronounced: two cases had been sentenced with a fine (one with a fine of US$ 1,500,000), two with imprisonment and a fine (one case with over one year imprisonment) and one with another form of punishment (namely community service).

4. The United States reported that their Internal Revenue Code[2] included provisions to make it impossible for individuals to obtain tax benefits or deductions for payments outside the United States that would constitute bribes or other inappropriate payments to foreign public officials. Further provisions were also applicable to "indirect payments", which included payments that inured to the foreign official's benefit or promoted his interests, regardless of the medium in which the payment was made and regardless of the identity of the immediate recipient or payor. In addition, illegal bribes, kickbacks or other payments to public officials by "controlled foreign corporations" were included as income to the United States parent corporation.

5. The illicit enrichment by public officials or elected representatives was no offence under United States legislation, since that would represent the shifting of the burden of proof from government to a defendant, which was not possible under the United States Constitution.

6. With regard to corporate criminal liability, the United States reported that the Foreign Corrupt Practices Act provided for penalties against any corporation, partnership, association, joint stock company, business trust, unincorporated organization or sole proprietorship. In addition, it was noted that under established United States law, a corporation was liable for any crime committed by an officer, employee or agent that was within the scope of his or her duties and was, at least in part, for the benefit of the corporation.

7. The United States reported that it was unlawful under the Money Laundering Control Act[3] to engage in a financial transaction using the proceeds of a specified unlawful activity, such as a bribe of a foreign official, knowing that the money involved constituted the proceeds of some unlawful activity with the intent to promote the specified unlawful activity, to conceal the nature, location, source, ownership or control of the proceeds, to avoid financial transaction reporting requirements or to commit certain tax offences. It was also unlawful to transport, transmit or transfer such proceeds in international commerce.

8. The United States adopted accounting standards and practices that improved transparency of international commercial transactions within the Foreign Corrupt Practices Act in 1977. Those standards had been developed by a non-governmental organization, the Financial Accounting Standards Board, with input from the United States Securities and Exchange Commission. The United States Department of Commerce and other executive branch agencies, as well as private professional accounting and legal organizations, and the Department of Justice encouraged the development of corporate compliance programmes. For organizations with effective compliance programmes in place, the United States Sentencing Guidelines provided for a reduction in criminal fines.

9. With regard to requests for mutual legal assistance from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions, no statistics were kept on that specific category. However, it was reported that 29 requests for mutual legal assistance involving bribery and corruption had been received between 1997 and 1999. The same applied for requests from the United States to other countries. A total of 23 mutual legal assistance requests involving bribery and corruption had been made between 1997 and 1999, but no information existed as to how many had involved international commercial transactions.

10. With regard to requests received from other countries in connection with criminal investigations and other legal proceedings brought in respect of corruption and bribery in international commercial transactions, it was unlikely that any of the five requests involving bribery and corruption received between 1997 and 1999 had involved international commercial transactions. Regarding requests from the United States to other countries, it was reported that,

although there were no statistics on that specific issue, on a few occasions, the United States had sought extradition in bribery and corruption cases involving international commercial transactions.

11. The United States noted that, in addition to mutual legal assistance, law enforcement authorities could share certain kinds of information, including publicly available information, with foreign law enforcement agencies. No specific legislation had been adopted concerning law enforcement cooperation to combat corruption and bribery in international commercial transactions. However, the United States general mutual assistance statute,[4] which also applied to cases involving corruption and bribery in international commercial transactions, had been broadened in 1996 to ensure that assistance could be provided at the earliest stages of an investigation.

12. Because of the time lapse between the receipt of the responses to the survey and the preparations of the report on the implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, the information on the status of adherence to the existing international legal instruments against corruption may have changed considerably. In that connection, the attention of the Commission on Crime Prevention and Criminal Justice is drawn to the report of the Secretary-General on existing legal international instruments, recommendations and other documents addressing corruption (E/CN.15/2001/3 and Corr.1), submitted to the Commission at its tenth session. In that document, it was stated that the United States had signed and ratified the Inter-American Convention against Corruption (E/1996/99, annex) and the OECD Convention (E/CN.15/2001/3 and Corr.1, paras. 29 and 32 and notes 11 and 14). In 1998, the United States adopted the International Anti-Bribery and Fair Competition Act, which amended the Foreign Corrupt Practices Act to implement the OECD Convention.

Notes

[1] 15 U.S.C. § § 78dd-1 ff.

[2] 26 U.S.C. § § 162 ff.

[3] 18 U.S.C. § 1956.

[4] 28 U.S.C. § 1782.

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Implementation of the International Code of Conduct for Public Officials

Report of the Secretary-General**

Addendum

1. An additional response to the survey instrument on the implementation of the International Code of Conduct for Public Officials was received from the United States of America, bringing the total number of responding States to 55. The information received from the United States is summarized below.

2. The United States reported that its laws and administrative policies included codes of conduct that set out clearly and consistently the functions and duties of public officials. The codes of conduct had been introduced over 10 years ago and included provisions on loyalty, efficiency, effectiveness (only for the judiciary and not for executive and legislative branches), integrity, fairness, impartiality, undue preferential treatment to any group of individuals, discrimination, abuse of authority, and gifts and benefits.

3. The United States noted that it had a comprehensive code of conduct in place that was being applied to all categories of public officials. Specific codes of conduct existed for reasons of constitutional law and administrative policy for members of the judiciary, excluding prosecutors, high-ranking military officers and politicians. A copy of the relevant codes of conduct, as well as a booklet on duties and obligations, was made available to all public officials upon request. The text was also available online and some officials were provided with copies. Training about ethics and professional behaviour was available. National authorities carried out campaigns to increase awareness of the provisions contained in the codes of conduct. The country was also planning to introduce new codes of conduct or improve the existing ones. The public administration required an oath from public officials

* E/CN.15/2002/1 and Corr.1.

** The response from the United States of America to the survey instrument on the implementation of the International Code of Conduct for Public Officials, reflected in the present document, was submitted within the prescribed time. However, owing to an oversight by the Secretariat, it was not included in document E/CN.15/2002/6/Add.1).

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when they commenced their duties. Regulations ensured accountability for action taken and decisions made by public officials in the performance of their duties, as well as requiring public officials to substantiate the administrative decisions or actions taken that affected the interests of individual citizens. Those provisions were included both in a law and in a code of conduct.

4. The United States indicated that, while safeguarding due process, laws and administrative policies foresaw disciplinary measures for the violation of regulations and codes of conduct. Those provisions covered the following contraventions: abstracting or destroying documents, deeds or any other article to which public officials had access by virtue of their office and the attempt thereof; abstracting public or private funds to which public officials had access by virtue of their office and the attempt thereof; utilizing, even after having left office, confidential information to which public officials had access by virtue of their office; and accepting, directly or indirectly, a gift or any other benefit that might place public officials under a moral obligation to accord preferential or special treatment. With regard to the legal basis for accountability and effective disciplinary action, the United States reported that they were incorporated both in a law and in a code of conduct.

5. Specific measures existed against the improper use by public officials of their position, influence and knowledge for the improper advancement of their own or their family's personal or financial interest, as well as the interests of other persons. A public official was obliged to declare business, commercial or financial interests or activities undertaken for financial gain when possible conflicts of interest might arise. Public financial disclosure was required of the highest-level public officials. Confidential financial disclosure was required of many mid-level officials. Judges might have to make declarations in remittal situations or as a precautionary disclosure to parties, and legislative branch staff were required to disclose confidentially to the senators for whom they worked. The legal basis for measures on conflict of interest and disqualification were both a law and a code of conduct.

6. With regard to measures aimed at regulating the fact that public officials after leaving their official position will not take improper advantage of their previous office, the United States noted that such measures were incorporated both in a law and in a code of conduct.

7. Under United States laws and administrative policies, public officials at higher levels in the administration and public officials who might be more vulnerable because of their position were required to disclose their assets and liabilities. That also applied to spouses of such officials. The financial disclosures were received and reviewed by designated government offices that also functioned as a disciplinary council for two government branches. Tax returns were only selectively reviewed by the Internal Revenue Service, together with all tax-payer returns.

8. The solicitation or the acceptance of any gift or benefit that might influence the exercise of functions of public officials and the performance of their duties was regulated under both United States law and a code of conduct. Both United States law and a code of conduct required public officials to ensure the professional secrecy of matters of a confidential nature and provided for disciplinary action if the obligation was not fulfilled. After separation of service, those restrictions only applied to a limited type of information, such as national security information.

9. The United States also noted that the political activity of public officials, when performed outside the scope of their office, was regulated both by law and by a code of conduct. The same applied to other activities performed outside the scope of their office.

10. The United States indicated that each of the three branches of the United States Government had a code of conduct tailored specifically to officers and employees of that branch, while at the same time certain statutes applied to the conduct of all public officials. In addition, the United States Constitution allowed each house of the United States Congress to develop its own rules of conduct.

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International cooperation in combating transnational crime

Progress made in the implementation of Economic and Social Council resolution 2001/12 on illicit trafficking in protected species of wild flora and fauna

Report of the Secretary-General**

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* E/CN.15/2002/1.

** The submission of the report was delayed because of extensive consultations undertaken with relevant organizations.

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I. Introduction

1. In its resolution 2001/12 of 24 July 2001, entitled "Illicit trafficking in protected species of wild flora and fauna" the Economic and Social Council requested the Secretary-General to prepare, within existing resources or drawing upon extrabudgetary contributions, in coordination with other competent entities of the United Nations system, a report analysing the domestic, bilateral, regional and multilateral legal provisions and other relevant documents, resolutions and recommendations dealing with the prevention, combating and eradication of illicit trafficking in protected species of wild flora and fauna by organized criminal groups. The Council also requested the Secretary- General to prepare, within existing resources or drawing on extrabudgetary contributions, in coordination with other competent entities of the United Nations system, a report analysing the domestic, bilateral, regional and multilateral legal provisions and other relevant documents, resolutions and recommendations dealing with illicit access to genetic resources and also the extent to which organized criminal groups are involved therein.

2. Given the limited resources available to the Centre for International Crime Prevention, as well as the limited time available to embark on a fully fledged study, the main purpose of the present progress report is to provide the Commission with a preliminary overview of the work of relevant organizations regarding illicit trafficking in protected species of wild fauna and flora and illicit access to genetic resources. It also provides a brief assessment of the scope and nature of the type of crime and the problems of enforcement involved (for the part concerned with trafficking), and of the solutions currently under discussion (for the part concerned with access), as well as a short description of the involvement of organized criminal groups (for both parts). Numerous international organizations, including the Food and Agriculture Organization of the United Nations (FAO), the Secretariat of the Convention on Biological Diversity, the secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Customs Cooperation Council (also called the World Customs Organization) and the International Criminal Police Organization (Interpol), as well as several non-governmental organizations, such as the World Conservation Union and the wildlife trade monitoring programme known as TRAFFIC,[1] have been approached and requested to supply any printed material that they may consider relevant to the mandate emanating from the Economic and Social Council.

II. Illicit trafficking in protected species of wild flora and fauna

A. Preliminary overview of the work of the main relevant organizations

1. Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

3. The secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora has its headquarters in Geneva and is responsible for monitoring the implementation of the Convention, which was opened for signature on 3 March 1973. The Convention entered into force on 1 July 1975, was subsequently amended, and currently has 157 parties. It regulates international trade in specimens of species of wild fauna and flora, including the export, re-export and import of live and dead animals and plants and of parts and derivatives thereof. Trade in such specimens is based on a system of permits and certificates, which can be issued if certain conditions are met, and which have to be presented before consignments of specimens are allowed to leave or enter a country. The animal and plant species subject to different degrees of regulation are listed in three appendices to the Convention. Appendix I includes some 800 animals and plants threatened with extinction and for which trade must be subject to particularly strict regulation and only authorized in exceptional circumstances. Appendix II includes species that are not necessarily threatened with extinction but may become so unless trade is strictly regulated. Appendix III contains species that are subject to regulation within the jurisdiction of a party to the Convention. Contrary to the listing of species in appendices I and II, which requires a two-thirds majority decision by the Conference of the Parties to the Convention, species in appendix III can be listed by parties on their own initiative. Parties are required to submit annual reports regarding trade, as

well as biennial reports on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention.

4. According to article VIII, paragraph 1, of the Convention, parties shall take in their domestic legislation appropriate measures to enforce the provisions of the Convention and prohibit trade in specimens in violation thereof, including measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State of export of such specimens. That does not necessarily mean that Parties have to consider illegal trade in wildlife as a criminal offence; they can instead choose purely administrative measures. The Convention can only be effective to the extent that member States enact and enforce the specific provisions. Domestic legislation is reviewed and assistance provided under the National Legislation Project.[2] According to information provided by the secretariat, 136 out of 146 Member States had been evaluated by 2000. Of those, only 37 (26 per cent) achieved the highest level of compliance with the provisions of the Convention; 47 Member States (32 per cent) did not meet the criteria even partially.[3]

5. For each meeting of the Conference of the Parties, the secretariat of the Convention prepares a review of alleged infractions of the Convention. Those reviews are intended to provide the parties with an overview of illicit trade and to identify significant problems concerning the issuance and acceptance of documents related to the Convention. An important initiative has been the development by the secretariat of a computerized system, known as TIGERS (Trade Infraction and Global Enforcement Recording System), to process reports of wildlife crime and illicit trade, identifying crime trends, methods and routes from a variety of sources. By monitoring the implementation of the Convention, the secretariat has established close working relationships, not only with regional and national law enforcement agencies, but also with the World Customs Organization and Interpol. The secretariat also has a record of engaging in verification and assessment missions to States parties to the Convention. The most recent mission, in conjunction with a member of the Interpol Wildlife Crime Working Group, was to the Russian Federation, where an in-depth study was made of the caviar trade. A confidential report has since been supplied to government agencies in the Russian Federation, addressing such issues as the following: export of caviar to international markets; control of domestic trade in caviar; anti-poaching activities; tackling organized crime; the possible involvement of legal traders in illicit activities; and legislation. Another recent innovation under the Convention is the Tiger Enforcement Task Force, which has identified the following areas upon which to concentrate its efforts initially: the gathering, analysis and dissemination of intelligence; guidance for specialized wildlife law enforcement units; and training.[4]

2. World Customs Organization

6. On 4 July 1996, the secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the secretariat of the World Customs Organization signed a memorandum of understanding establishing a legal framework for international cooperation between the two organizations, providing for the controlled exchange of information and the development of synergies between customs and management authorities at the national level, and promoting measures to raise awareness as well as training for the relevant services.[5] The strategic position of customs, at frontier points, makes it the best-placed administration to check that the Convention is being properly applied. The secretariat of the Convention is represented at all relevant meetings of the World Customs Organization and the Interpol Wildlife Crime Working Group. The Organization has recently merged specialized groups like the World Customs Organization/Convention working group into its larger "Protection of Society" working group, which covers a range of cross-border and international criminal activities, including money-laundering and trafficking in drugs, weapons, cultural items, wildlife, stolen vehicles etc. That is the main group that the secretariat of the Convention currently works with, although it has also cooperated with the Harmonized System Directorate and the Scientific Subcommittee of the Organization. Customs officers attend national and international training seminars on the Convention organized by the secretariat of the Convention, the secretariat of the Organization and certain States. They have specific documentation and training packages in several languages prepared by the organizers. The secretariat of the Convention also has many customs specialists who help to train their colleagues and raise awareness.

7. Moreover, the secretariat of the World Customs Organization assists States members of the Organization by disseminating information and intelligence through the system of Regional Intelligence Liaison Offices using the customs enforcement network. The Organization has 11 such Offices throughout the world, with 120 customs administrations being linked through the system. The Regional Intelligence Liaison Offices compile seizure data relating to customs offences from all sources, analyse national, regional and global seizure information, and identify new or unusual smuggling trends and methods. The customs enforcement network is a system for combating customs offences through the analysis and communication of customs information. It is based on Internet technology and provides an effective, secure, inexpensive and round-the-clock system. The database is protected, access only being granted to recognized addresses, and the forwarded information is encrypted. It is an effective way to exchange information in a secure environment between customs administrations throughout the world.

8. The World Customs Organization also provides legal instruments to its members for the exchange of information and cooperation between customs administrations at international, regional and bilateral levels. The Nairobi Convention, signed in June 1977 and ratified by 40 States members of the Organization, is an international convention on mutual administrative assistance for the prevention, investigation and repression of customs offences. Other relevant instruments include the Model Bilateral Agreement, and recommendations and resolutions of the Organization.

9. The above-mentioned instruments provide additional tools for strengthening international cooperation, not only within the customs community, but also with other partners at all levels. The implementation of such enforcement tools increases the effectiveness of customs administrations, facilitating their daily action and encouraging dynamism and improved performance.

3. International Criminal Police Organization

10. Within Interpol, a resolution requesting States members to cooperate in cases related to wildlife crime was adopted at the Interpol General Assembly in 1976. A wildlife subgroup (now entitled Wildlife Crime Working Group) was established in 1993.[6] The objectives of the Working Group are to improve the exchange of information (including criminal intelligence) on persons and companies involved in the illegal trade in wild flora and fauna; to support investigations into illegal activities related to wildlife crime by improving national, regional and international law enforcement; to exchange information on methods and trends in such illegal trade, with a view to developing a more proactive approach; and to develop training and information documents needed for the investigators. A formatted ECO-message, including fields for data that are essential for effective assessment and analysis of supplied information, has been created to facilitate the compilation of information on environmental crime in the database of the Interpol secretariat. A group of experts has finalized a comprehensive training package, and training courses have already been conducted, with regional training courses planned for the future. The cooperation between Interpol and the secretariat of the Convention has resulted in a memorandum of understanding, signed in October 1998. Although the memorandum of understanding is not formally binding on the national authorities, it urges the authorities of the secretariat of the Convention and law enforcement agencies—police and customs—to work closely together in each country in order to combat wildlife crime more effectively. A practical guide on cooperation between the management authorities of the secretariat and Interpol has been distributed in English, French and Spanish to the appropriate authorities.

4. European Union

11. The European Union implemented the obligations arising from the Convention by its Regulation No. 3626/82, which entered into force on 1 January 1984. That Regulation has been replaced by Council of the European Union Regulation No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein, which, since 1 June 1997, provides for a stricter control and sanctions[7] regime. The main efforts have been directed towards endangered species crossing external borders of the European Union. The directive has to ensure more harmonized wildlife trade policies and better trade controls among the 15 States members of the European Union. The European Commission coordinates an enforcement working group of the European Union,

which meets annually and brings together police, customs and Convention authorities from its member States.

5. Lusaka Agreement Task Force

12. The Lusaka Agreement of 8 September 1994 was the culmination of the first meeting of African wildlife enforcement officers, held in Lusaka in 1992. The meeting resolved to set up a mechanism, the Lusaka Agreement Task Force, to facilitate cooperation among wildlife law enforcement agencies in the various countries. The Parties to the Agreement, which came into effect in December 1996, are the Governments of the Congo, Kenya, Lesotho, Uganda, the United Republic of Tanzania and Zambia. Ethiopia, Swaziland and South Africa are signatories. Each Party[8] has the obligation, individually and jointly, to take appropriate measures, in accordance with the Agreement and in cooperation with the Task Force, to investigate and prosecute cases of illegal trade.[9] The Task Force, which has its headquarters in Nairobi and is referred to by many as "African Interpol" for wildlife, wants to create consistency in the way wildlife criminals are dealt with in the region. It has meanwhile been involved in investigating and presenting evidence of illegal trade in wildlife species in Africa, resulting in major ivory seizures.

6. North American Agreement on Environmental Cooperation

13. When Canada, Mexico and the United States of America strengthened their economic ties through the North American Free Trade Agreement, they also pledged to undertake a new environmental partnership. In 1993, the three States signed the North American Agreement on Environmental Cooperation and created the Commission on Environmental Cooperation. Among the objectives of the North American Agreement on Environmental Cooperation is the building of regional cooperation for the conservation, protection and enhancement of the environment. The North American Agreement on Environmental Cooperation also commits the parties to the effective enforcement of their respective environmental laws, including those protecting wild flora and fauna. Responding to those commitments, the Commission on Environmental Cooperation, in 1995, established an Enforcement Cooperation Program to provide a forum for regional cooperation, exchange expertise, build enforcement capacity and explore alternative approaches to effective enforcement. The Council of the Commission on Environmental Cooperation constituted a North American Working Group on Environmental Enforcement and Compliance Cooperation to serve as a forum for regional cooperation. The North American Wildlife Enforcement Group is a network of senior wildlife enforcement officials and participates as a member of the Working Group; it provides guidance in identifying priorities for regional cooperation in working to protect wildlife across the continent, in particular with respect to commitments under the Convention.

B. Assessment of the scope and nature of the crime

14. In the absence of an exhaustive and reliable register of wildlife trafficking, together with indicators of the number of undetected cases,[10] an assessment of the scope and nature of the problem becomes difficult. As there is seldom a complainant, enforcement agents can only record detected cases or seizures; thus, the view of the situation as a whole is flawed. However, recent United States estimates put the profits of wildlife trafficking somewhere between 2 billion and 3.5 billion United States dollars ($) per year.[11] Worldwide, legal as well as illegal trade in wild animals (dead or alive) and plants, and in by-products such as ivory, skins, coral and medicines, is thought to represent an annual turnover of several billion dollars. The World Wildlife Fund estimates the total at $20 billion.[12]

15. Available statistics on the world trade in animals, plants and their products indicate that there are countries that are virtually exclusively exporters (or producers), and others that are essentially importers (or consumers).[13] The latter are often re-exporters of finished products. The exporting countries are in Africa, Asia, Central and South America and Eastern Europe; the consumers are in, East Asia (China (Hong Kong Special Administrative Region), Japan, Republic of Korea and Singapore), Western Asia, North America and Western Europe. Some countries (Canada, Australia, South Africa) are both consumers and producers.

16. Live animals are hidden in secret compartments, in shipping containers, under clothing or in luggage,

and smuggled across international borders, or are openly declared at the border, but accompanied by false paperwork to make their importation appear legal. The end purchasers of living animals are very often people who are either keepers of live pets or collectors of endangered species such as falcons or exotic reptiles.

17. Wildlife animals and their parts are smuggled for commercial or personal use and serve as food (for example, bush meat and caviar), luxury products (such as shatoosh shawls from the wool of the Tibetan antelope), medicine (more particularly the traditional Chinese medicine using, for example, rhinoceros horn) or cosmetics.

18. The threat posed by wildlife trade is being increasingly recognized. By way of example, according to the findings of the first full report on animal trafficking, produced by the Brazilian National Network against the Trafficking of Wild Animals,[14] wildlife trafficking in Brazil has reached unprecedented levels. Birds represent up to 82 per cent of the illegal trade, while mammals represent 14 per cent and snakes 3 per cent. A government statement showed the number of animals found by the police had risen to 61,182 in 2000, up from 23,100 in 1998. But the survey, which includes detailed maps of trafficking routes for live cargoes of everything from rare parrots to deadly snakes, noted that only 0.45 per cent of the total amount of animals smuggled each year are intercepted by the police. Moreover, Colombia and Peru are home to the favourite fauna of animal traffickers: Peru is a prime hunting ground for iguanas, crocodiles and anacondas; and, in Colombia, poaching has driven several parrot species to the brink of extinction.[15] Argentina, Mexico, Paraguay and Uruguay, on their side, seem to serve as transit points for Asia, Europe and the United States. African, Asian and Eastern European countries face the same problems, and are afraid to lose their biodiversity.

C. Involvement of organized criminal groups

19. Preliminary research findings give evidence of the highly organized character of the illegal trade in protected species.[16] Trafficking in animals and plants is less costly in investment and less risky than drug trafficking, though very lucrative. Powdered rhinoceros horn can be worth more than the equivalent weight of heroin or cocaine. Rare parrots can fetch tens of thousands of United States dollars on the black market. Several observers have argued that a low level of vigilance and a modest level of penalties applied have all attracted the attention of criminal organizations.

20. Various sources demonstrate illicit trafficking links with traditional criminal organizations. Illegal trade in ivory has long been recognized as helping fund rebel groups in parts of Africa, and there is some suspicion that illegal trade in wildlife may be used to fund terrorist groups. The secretariat of the Convention is aware of several areas in Asia and Africa where insurgent groups engage in illegal hunting for profit and impose taxes on wildlife parts and derivatives as they pass illegally across borders. Wildlife experts[17] claim that Chinese, Japanese, Italian and Russian gangsters are heavily involved in illegal wildlife trade. Triad societies such as the Wo Shing Wo group and 14K are smuggling ivory, rhino horn, shark fin and abalone into South Africa.[18] Galster[19] refers to a well-financed and highly organized illegal trade in whale meat. The Neapolitan Mafia is said to be behind illegal trading in endangered parrots.[20] Some of the poachers of tigers[21] and bears[22] are believed to have links to organized criminal groups in the Russian Federation. Moreover, approximately 90 per cent of the sturgeon caught in 1995 in the Northern Caspian basin seem to be handled by those groups.

21. There exist also examples of a combination of wildlife smuggling and drug trafficking, especially in Latin America. It has been claimed that the Cali drug cartel in Colombia smuggled mixed shipments of drugs and wildlife products into the United States. Galster[23] supports that claim by presenting undercover investigations undertaken by the Endangered Species Project, which found criminal organizations with tentacles to almost every part of the world.[24] The increased role of Mexican drug dealers was also noted. The secretariat of the Convention review of infractions also makes reference to the combined smuggling of parrots and drugs from Côte d'Ivoire to Israel.[25] The Brazilian National Network against the Trafficking of Wild Animals[26] indicates that, out of an estimated 400 criminal rings smuggling animals, 40 per cent were involved in other criminal activities, mainly drug trafficking. One famous case, in which cocaine was found stuffed into live boa constrictors being shipped abroad serves as an example.[27] The linkage between

animal trafficking and drugs smuggling is confirmed by agents from the United States Fish and Wildlife Service, who state that smugglers often trade illegal drugs for endangered animals in cashless transfers,[28] creating thereby a special form of money-laundering.

22. However, other sources believe that those criminal organizations that traditionally deal in drugs, arms, human trafficking and contraband are only marginally involved in the above-mentioned forms of criminality at the current stage. According to the national report of the United Kingdom of Great Britain and Northern Ireland to the meeting of the seven major industrialized countries (Group of Seven) and the Russian Federation held in June 1999,[29] there is little substantial evidence to support the claim that organized crime groups have already fully embarked on environmental crime. But, even if that were the case, given the low level of detection and modest penalties, it is unlikely that organized crime will leave that business unattended in the future.

23. Most wildlife smugglers may still operate within their own domain, which means that there is a hidden market beneath the legitimate trade in exotic animals and plants, and that there exists another type of emerging criminal organization focusing exclusively on wildlife products.

24. In sum, when considering such crime, it is essential to bear in mind the diversity of ways in which the perpetrators can be organized. Indeed, there are several different forms that criminal organizations involved in the trade in endangered species can take:

(a) The general organized crime group that has a wide portfolio of activities and that includes trafficking in endangered species as merely one of those activities. The involvement of such groups in that particular illegal market can be infrequent, sporadic or sustained, depending on the calculation of risk and profit and the attractions of alternative markets and products. Chinese criminal organizations, for example, tend to traffic in endangered species on a regular basis, partly because of the demand for products derived from those species for use in traditional Chinese medicines and remedies;

(b) Smuggling networks that traffic in endangered species as merely one among several illegal, regulated or stolen products. In the mid-1990s, for example, Global Survival Network, a non-governmental organization based in the United States, started to focus on the targeting of women from the former Soviet Union when it realized that the same groups that were targeting Siberian tigers were also moving women to Western Europe and elsewhere for commercial sex;

(c) Networks that specialize in smuggling in endangered species rather than engaging in a much broader range of criminal activity. These are likely to follow the model of moving from licit import and export of animals and birds to the illegal side of the trade.[30] That process can be gradual or abrupt;

(d) The key point about all of those criminal organizations, however, is that they depend on the connivance and collusion of ostensibly legitimate people and groups if they are to operate effectively in illegal markets. Indeed, much of the demand comes from private citizens or unscrupulous zoos or parks more concerned about the popularity than the legality of their animal attractions.

D. Assessment of enforcement

25. Investigations worldwide have led to large Convention-related seizures of live animals and dead specimens and products. However, the threat posed by the illegal wildlife trade is not yet well understood by government policy makers, the courts or the public.

26. Penalties for violations of individual wildlife trade laws vary considerably among States members of the secretariat of the Convention. China has sentenced several wildlife criminals to death, and the secretariat knows of at least two criminals in China who were sentenced to life imprisonment in 2001. In the United States, a caviar company was fined over $10 million. But, while wildlife smugglers can face imprisonment of up to seven years[31] in the United Kingdom, the maximum penalty for infringement of the Convention is three months in Belgium.[32] Moreover, in Brazil only fines are administered, and, rarely, a one-year sentence.[33] Furthermore, as has been mentioned already, in some member States, illegal trade in wildlife is not even considered a criminal offence and is treated under administrative law.

27. Since violations of wildlife trade regulations are often deemed insignificant, appropriate sanctions are rarely used. In addition, as illegal wildlife trade is

often considered only a petty crime, smugglers get away with just minor warnings. Furthermore, most national systems may be in need of additional personnel resources, increased public awareness and continued education of enforcement staff regarding why those cases are deserving of attention, in order to enhance their expertise and intervention capacity.

28. Investigation of wildlife crime needs to be adapted to the organized character of that type of crime. The secretariat of the Convention believes that the use of trained dogs to detect musk and musk products in cargo and passenger baggage, especially given the pungent smell of raw musk, could prove very effective, if deployed at relevant border points.[34] DNA profiling is regularly used to combat illicit trade in caviar, and the secretariat of the Convention works actively to increase awareness of the way in which forensic science supports law enforcement officials. The use of methods such as forged documents and carefully planned trade routes also call for the use of specialized investigation and prosecution units.

29. The trade is clearly a global one involving countries of origin as well as transit countries, where false certificates and repackaging are conducted and the final distribution organized. Moreover, the new marketplace provided by the Internet appears already to have been used extensively for illegal trade in endangered species. Therefore, such criminality cannot be addressed effectively by any unilateral effort, no matter how effective, but can only be successfully countered through international cooperation.[35]

III. Illicit access to genetic resources

A. Relevant legal framework

1. International conventions and treaties

(a) Convention on Biological Diversity

30. The Convention on Biological Diversity of 5 June 1992 has so far been ratified or acceded to by 182 parties.[36] The secretariat of the Convention has its headquarters in Montreal, Canada, and is responsible for assisting the parties with the implementation of the Convention and the coordination of activities with other international bodies. The specific functions of the secretariat are set out in article 24 of the Convention.

31. Article 2 of the Convention defines "genetic resources" broadly to include all "genetic material of actual or potential value". "Genetic material" in turn, is defined as "any material of plant, animal, microbial or other origin containing functional units of heredity". It should be noted that the Convention does not provide a definition of "illicit access". Article 15 of the Convention only sets the basic framework within which access to genetic resources is to take place.[37] Activities subject to the provisions relating to genetic resources must also be consistent with other provisions of the Convention, such as article 8 (j), calling for protection of knowledge, innovations and practices of indigenous and local communities. Traditional knowledge associated with biological resources is an intangible component of the resource itself, because such knowledge provides leads for the development of useful products and processes, which save investments of time and money in research and product development by modern biotechnology industry.

32. The provisions of the Convention calling for access to genetic resources "on mutually agreed terms" strongly suggest that access and benefit-sharing arrangements will be a primary vehicle for obtaining access to genetic resources and for sharing the resulting benefits, including technologies. The terms of the Convention acknowledge that a range of actors may be involved in access and benefit-sharing, including local and indigenous communities, holders of traditional knowledge, scientific and academic institutions and the private sector. The requirements of mutually agreed terms and prior informed consent may be interpreted to apply to all of those players.

(b) International Treaty on Plant Genetic Resources for Food and Agriculture

33. As it has been stressed by the FAO Commission on Genetic Resources for Food and Agriculture, there exist substantial differences between wild genetic resources and agricultural genetic resources. Crops and domestic animals are widely shared around the world, and the value of the resources lies in the intra-specific diversity, which is the basis of crop and animal improvement.

34. Therefore, on 2 November 2001, FAO adopted, in keeping with the Convention on Biological Diversity, a binding International Treaty on Plant Genetic Resources for Food and Agriculture. The Treaty

includes a multilateral system of facilitated access and benefit-sharing (articles 10-13) for "any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity" listed in the annex to the Convention. The concept of farmers' rights set out in article 9 is analogous to the terms of article 8 (j) of the Convention on Biological Diversity. The Treaty will enter into force upon ratification by 40 countries.

2. Regional initiatives

35. In response to article 15 of the Convention on Biological Diversity, regional initiatives have been undertaken to assist States in the respective regions in implementing article 15 of the Convention. Those regional approaches include: Decision 391 of the Andean Community on a common regime on access to genetic resources; the model legislation of the Organization of African Unity for the protection of the rights of local communities, farmers and breeders and for the regulation of access to biological resources; and the draft Association of South-East Asian Nations (ASEAN) framework agreement on access to biological and genetic resources.

(a) Decision 391 of the Andean Community on a common regime on access to genetic resources

36. Decision 391 of the Andean Community,[38] adopted on 2 July 1996 by the Commission of the Andean Pact for Bolivia, Colombia, Ecuador, Peru and Venezuela, has become an example for international law and policy development regarding access to genetic resources and the protection of the accumulated knowledge of indigenous peoples. That Decision introduces the common system on access to genetic resources with a view to: (a) establishing conditions for a just and equitable participation in the benefits generated from access; (b) establishing the basis for the recognition and valuation of genetic resources and their derived products, as well as of their intangible components, particularly in the case of indigenous communities; (c) promoting the conservation and sustainable use of biodiversity; (d) promoting the development and enhancement of local, national and regional scientific, technical and technological capacities; and (e) strengthening the negotiating capacities of Member States (article 2).

(b) African model legislation for the protection of the rights of local communities, farmers and breeders and for the regulation of access to biological resources

37. On the basis of the approach of the Andean Community, the Organization of African Unity developed, in September 2000, model legislation on community rights and access to biological resources in order, as stated in the preamble, to implement article 15 and article 8 (j) of the Convention on Biological Diversity. As in Decision 391 of the Andean Community, the rights of indigenous communities and local farmers and breeders to decide on access to resources on their territories or lands, as well as to their knowledge, innovations and practices, receive special attention.

(c) Association of South-East Asian Nations framework agreement on access to biological and genetic resources

38. The States members of ASEAN prepared, in February 2000, a framework agreement to ensure that access regulations within the region are uniform and consistent. The draft text mentions explicitly that effective participatory measures for the granting of prior informed consent up to the local level have to be granted (article 2).

3. National measures

39. In addition to those regional initiatives, approximately 40 States have, or are in the process of developing, appropriate legislative, administrative or policy measures governing access to genetic resources in their territories and the equitable sharing of benefits arising from their use.

40. In sum, most exchange of genetic resources is regulated—where it is regulated—under individual contractual instruments, enforceable under private law. There is no international agreement that defines certain actions as criminal.

B. Preliminary assessment of problems encountered

41. Access goes together with the sharing of benefits. Although the sharing of benefits is one of the three main objectives of the Convention, much work still

needs to be done in the implementation of national systems for access to genetic resources and in the development of fair and equitable access and arrangements for the sharing of information.

1. Absence of prior informed consent and violation of mutually agreed terms on the sharing of benefits

42. The Governments of several States, together with various non-governmental organizations, are concerned about the serious impact of what is considered biopiracy—the exploration, extraction and screening of biological diversity and indigenous knowledge for commercial, genetic and biochemical purposes by patenting and mapping chromosomes of genetic resources without informing, consulting, acknowledging and duly compensating provider countries, including their indigenous and local communities. While bioprospecting only identifies biological resources and traditional knowledge with commercial potential, biopiracy appropriates those resources and knowledge or privatizes them for commercial gain without obtaining prior informed consent or awarding just compensation.

43. By way of example, the case of Ayahuasca, a plant cultivated by indigenous communities for religious and medicinal purposes throughout the Amazon, can be mentioned. A student in pharmacology brought the plant from Ecuador to the United States in the mid-1980s and applied for a United States patent, which was awarded in 1986. The indigenous communities heard about the existence of the patent in 1994. A request for re-examination was filed to the United States Trademark and Patent Office in March 1999 and the patent was annulled shortly thereafter.[39] The Ayahuasca case was not unique. In 1994, a university in the United States patented a variety of the indigenous grain quinoa, long used by Andean farmers. Because of concerns among exporters in Bolivia about the potential impact of the patent on their future production and exports to the United States, a campaign was initiated and ended in 1998, when the University dropped the patent. Other examples can be given: the plant sangre de drago (cultivated by indigenous people in Central and South America), West African sweet genes, Indian turmeric and several uses of the neem tree, well known and widely used in Asia and East Africa, have been patented by large pharmaceuticals.

44. It has, however, to be said that the public often has a very unreal picture of the value of genetic resource samples. While a particular species, if a biomedicine is found in it, synthesized and patented, may potentially provide a product with great commercial value, very few plants do. The United States delegation at a recent meeting of the Genetic Resource Committee of the World Intellectual Property Organization (WIPO) noted that, in bioprospecting, only one sample in 10,000 merited more than an initial screening, which was followed by enormous development and regulatory costs.[40]

2. Intellectual property rights over products developed using genetic resources and traditional knowledge

45. The Convention on Biological Diversity does not provide a clear guide as to how intellectual property rights should be addressed in access agreements, although most of the problems are linked to the question of intellectual property rights over products developed using resources provided under the agreement. There is considerable confusion in the international debate concerning intellectual property rights and genetic resources.

46. The question whether patents can be granted on products developed out of genetic resources is highly controversial, as reflected in the following points:

(a) With regard to the International Convention on the Protection of Industrial Property (Paris Convention) of 1883, of the more than 100 signatory States, as at 1988, 53 statutorily excluded plants and 54 excluded animals from protection.[41] Those exercising the right of exclusion included the States of the European Patent Convention, as well as a number of developing countries,[42] which adopted the WIPO Model Law for Developing Countries on Inventions, volume I, dealing with patents. Both instruments contain exclusions for patents for "plant or animal varieties and the essentially biological processes for the production of plants and animals". That language has proven ambiguous because the definitions of "varieties" and "essentially biological processes" have become unclear in the era of genetic engineering;

(b) The conclusion of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994[43] has complicated the situation. According to

article 27, paragraph 3 (b), only plants and animals other than micro-organisms and "essentially biological processes for the production of plants and animals" may be excluded from patent protection. The TRIPS Agreement provides minimum standards of protection for patents, while States members of the World Trade Organization are free to grant a higher level of protection under their national laws. Thus, countries like India can deny patents on life forms, except on micro-organisms and microbiological and non-biological processes, in accordance with the provisions of the TRIPS Agreement. At the same time, if another country, for example, the United States, chooses to grant patents on plants or other life forms, India cannot object. Nevertheless, such patents will have force only in the United States and cannot be enforced in India, as patents are granted under national patent laws and have territorial application only;

(c) The compatibility of the TRIPS Agreement with the Convention on Biological Diversity is being considered in the context of discussions in the Council for TRIPS regarding the revision of the Agreement. The World Trade Organization Ministerial Declaration adopted in Doha on 14 November 2001 instructs the Council for TRIPS, in pursuing its work programme, to examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity;

(d) Several cases have been reported in which patents already granted were challenged, mostly because the existence of traditional knowledge showed that the invention was not novel. In addition to the Ayahuasca and quinoa cases cited above, the turmeric powder case should also be mentioned,[44] in which the Indian Council of Scientific and Industrial Research succeeded in 1997 in convincing the United States Patent and Trademark Office to revoke a patent granted to two United States scientists on the use of turmeric powder as a healing agent. The United States Patent and Trademark Office ruled that using the popular spice for medicinal purposes was not a new "invention" but an Indian practice that had existed for millennia. The written documentation produced by the Indian Council of Scientific and Industrial Research referred to ancient Sanskrit texts and a paper published in 1953 in the *Journal of the Indian Medical Association*. Similarly, the patent acquired by an American firm for a fungicide, derived from the seeds of the neem tree, was revoked by the European Patent Office in May 2000 on the grounds that it was not a new technology;[45]

(e) The task of revoking a patent is not impossible, but it remains a daunting task, while being also expensive and time-consuming. Several States and non-governmental organizations have therefore claimed the right to use appropriate legal and institutional means to ensure recognition of the rights of indigenous and local communities to their traditional knowledge based on biological resources at the international level. At the meeting of the World Trade Organization Committee on Trade and Environment held on 5 and 6 July 2000,[46] India presented a paper on "Protection of biodiversity and traditional knowledge", calling for international action to counter biopiracy and to promote the sharing of benefits in cases where the use of genetic resources is legitimate. The paper drew support from a number of other countries, including Brazil, Cuba, Malaysia and Peru, which endorsed the need for international action to ensure the establishment of minimum multilateral standards to protect traditional knowledge.

47. As far as agricultural resources are concerned, the International Treaty on Plant Genetic Resources for Food and Agriculture of 2001 exempts the world's principal food crops from the rules relating to intellectual property rights. It is agreed that intellectual property rights cannot be claimed on material in the form received under the multilateral system of facilitated access and benefit-sharing established by the Treaty.[47] If a product that incorporates material accessed from the multilateral system is commercialized, an equitable share of the benefits has to be paid to a trust account. Such a payment is only mandatory if the product is not fully accessible for further research and breeding; in the case of free use by researchers and breeders the payment is voluntary.[48]

C. Possible solutions currently under discussion

1. Establishment of minimum standards to protect traditional knowledge

48. Despite the foregoing observations, intellectual property rights could still serve as a very useful tool to ensure, for example, benefit-sharing through joint ownership and the sharing of royalties arising from the

exploitation of patents. It has been noted in a document prepared by the secretariat of the Convention on Biological Diversity that intellectual property rights can contribute to the implementation of relevant obligations under the Convention.[49] In order to do so, applications for intellectual property rights need to be completed with a requirement that relevant provisions of the Convention have been followed with respect to prior informed consent and mutually agreed terms, as well as with a requirement to disclose the origin of genetic resources and/or the traditional knowledge used. Decision 391 of the Andean Community[50] provides a good illustration of how those issues can be addressed. Such a disclosure of the use of traditional biodiversity-related knowledge may provide grounds for not granting a patent. Since the patenting process normally requires the description of the invention and the background knowledge on which it is based, patent examiners could reject a patent application if it were found that previous knowledge in that area showed that the invention was not novel.

49. The Conference of the Parties to the Convention on Biological Diversity[51] invited organizations such as WIPO to analyse the issue of including a provision of information on the origin of genetic resources, if known, when submitting applications for intellectual property rights, including patents. An Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was founded, and began discussing the development of model intellectual property clauses for contractual arrangements on access to genetic resources and benefit-sharing. WIPO has also created a Traditional Knowledge Task Force to study a draft Traditional Knowledge Resource Classification and its proper relationship to the International Patent Classification.

50. In addition, a number of Governments (including the member States of the Andean Community in accordance with Decision 391) are of the view that there is a need to develop sui generis systems for the protection of traditional knowledge.[52] The first sui generis model for the protection of traditional knowledge-related subject matter was developed jointly by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and WIPO in 1982 and is embodied in the UNESCO-WIPO Model Provisions for National Laws on the Protection of Folklore from Illicit Exploitation and Other Prejudicial Actions.

2. Strengthening and monitoring of existing instruments and applying sanctions in case of non-compliance

51. An instrument of prior informed consent should contain elements for assessing its practical effects and promoting observance of its terms.[53] To be able to notice violations of the rules on informed consent and benefit-sharing, a good monitoring system is necessary. Monitoring the implementation terms of access and benefit-sharing agreements is a difficult task, particularly in cases where benefits are long-term and product development occurs outside of the country of origin.

52. Enforcement requires not only the authority and ability to track activities and to collect information, but also the availability of sanctions. Contrary to the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[54] dealing with the trade in or possession of endangered species of protected animals and plants, the Convention on Biological Diversity does not oblige States to penalize violations of the Convention. Sanctions for violations of procedures for prior informed consent and of access agreements would, however, facilitate implementation of the Convention on Biological Diversity. Reference can be made to another instrument of prior informed consent, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. That instrument defines "illegal traffic" in article 9 and creates obligations on parties to check such traffic and punish it through criminal sanctions. Taking the Basel Convention as an example, the following situations could be covered: export of genetic resources without any prior informed consent at all; export of genetic resources not obtained in compliance with the prior agreement; and forgery of export certifications confirming the correct acquisition of genetic material.

53. The Draft Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization[55] (prepared by the Ad Hoc Open-ended Working Group on Access and Benefit-sharing) include provisions on national monitoring and reporting, means for verification in user countries, settlement of disputes and remedies. Article 59, indicating that States may take "appropriate

effective and proportionate measures for violations of national legislative, administrative or policy measures implementing the access and benefit-sharing provisions of the Convention on Biological Diversity, including requirements related to prior informed consent and mutually agreed terms", is formulated purely as an option ("may"), not as an obligation. The same can be said for the provisions contained in regional instruments such as Decision 391 of the Andean Community[56] and the African model legislation.[57]

D. Involvement of organized criminal groups

54. No research findings or information on the involvement of organized criminal groups in illicit access to genetic resources has been found so far. The lack of evidence of such involvement may be due to the fact that the market is still developing in ways that are not yet fully realized. It could, however, be expected that, if there were a demand for such products that could not be met because of regulatory constraints, organized crime might step in to provide the supply.

IV. Concluding remarks

55. As far as illicit trafficking in protected species of wild fauna and flora is concerned, there are numerous ongoing or planned actions by the secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and by non-governmental organizations such as TRAFFIC. In November 2001, TRAFFIC, together with the Environmental Law Centre of the World Conservation Union, organized a workshop for representatives of European Union wildlife trade regulatory agencies, public prosecutors and non-governmental organizations to develop recommendations for improving the implementation of European Union Regulation No. 338/97. The workshop called for the development of sentencing guidelines, the establishment of enforcement networks and improved cooperation among enforcement agents. Initiatives taken at national and regional level can serve as an example for new actions at the international level. In order not to duplicate efforts by specialized organizations, further research by the Secretariat of the United Nations could concentrate on the involvement of organized criminal groups in the trafficking phenomenon.

56. Concerning illicit access to genetic resources, any further research will have to take into consideration the initiatives by the secretariat of the Convention on Biological Diversity and relevant organizations specialized in intellectual property rights.

Notes

[1] Trade Records Analysis in Flora and Fauna in Commerce (TRAFFIC) is the world's largest wildlife trade monitoring programme, with offices covering most parts of the world. It is a partnership between the World Wildlife Fund—World Wide Fund for Nature and the World Conservation Union and was established to monitor trade in wild plants and animals. It works in close collaboration with the secretariat of the Convention.

[2] "The project, having started in 1992, is currently in its third phase. The following progress has been made in the seven years since the project started: (a) the analysis and review (or update thereof), of the national legislation of 136 Parties has been carried out; (b) recommendations to suspend trade with some Parties for non-compliance have been undertaken; (c) concerning technical assistance provided to the Parties in the development of their national legislation, a package of technical support documents (checklist, models of law, questionnaires, guidelines) has been prepared by the Secretariat; and (d) a database incorporating the National Legislation Project findings, and other legal information, has been created by the Secretariat." See "Interpretation and implementation of the Convention—National laws for implementation of the Convention, National Legislation Project", document submitted by the secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to the eleventh meeting of the Conference of the Parties, held in Nairobi from 10 to 20 March 2000 (Doc. 11.21.1), p. 1.

[3] See "Interpretation and implementation of the Convention—National laws ...", annex 2.

[4] See http://cites.org/eng/notifs/2001/047.shtml/

[5] http://www.wcoomd.org/ENF/CITES/BROCHE/27.htm

[6] http://www.interpol.int/Public/Publications/ICPR/ICPR481_1.asp

[7] See article 16 of Council of the European Union Regulation (EC) No. 338/97 of 9 December 1996.

[8] See article 4 of the Lusaka Agreement.

[9] See article 5, para. 9, of the Lusaka Agreement.

[10] Interpol, "Project PRIMATES. A strategic assessment of international wildlife crime", October 1999, p. 11, cited in Svend Soyland, "Criminal organizations and crimes against the environment—A desktop study" (United Nations Interregional Crime and Justice Research Institute, Rome, 2000), p. 29.

[11] United States Fish and Wildlife Service, 26 June 1998, cited in Soyland, "Criminal organizations ...", p. 28.

[12] Cited in Soyland, "Criminal organizations ...", p. 28.

[13] http://www.wcoomd.org/ENF//BROCHE/17.htm

[14] See http://www.planetark.org/dailynewsstory.cfm/newsid/13298/story.htm

[15] See http://www.planet-pets.com/petperiodicals/petperiod270.htm

[16] Data and information provided by TRAFFIC and by Soyland, "Criminal organizations ...". One example of a major German wildlife trade case is the FUNDACEF case, in which a German national was sentenced to three years' imprisonment in December 2000 for smuggling protected live animals for zoos and wildlife parks. Species included specimens listed in CITES appendix I, such as orang-utans, Javan gibbons, Komodo dragon and red-crowned cranes, and involved more than 25 countries. However, even though the prosecution stated that the case involved organized criminal activity, the prosecution charges on organized crime were dismissed.

[17] *Los Angeles Times*, 1995, cited in Soyland, "Criminal organizations ...", p. 29.

[18] The Xinhua News Agency, 5 July 1995, in E. Savona, "Recent trends of organized crime in Europe", working paper No. 18, Transcrim, research group on transnational crime, University of Trento (Trento, Italy, 1998), p. 67, cited in Soyland, "Criminal organizations ...", p. 33.

[19] S. Galster, ed., *Crime against Nature. Organised Crime and the Illegal Animal Trade. An investigative Report by the Endangered Species Project* (San Francisco, California, Earth Island Institute, 1996), cited in Soyland, "Criminal organizations ...", p. 39.

[20] Press release, United Kingdom Department of Environment, Transport and the Regions, 5 April 1998, cited in Soyland, "Criminal organizations ...", p. 36.

[21] Galster, *Crime against Nature* ..., cited in Soyland, "Criminal organizations ...", p. 32.

[22] P. Knights, ed., *From Forest to Pharmacy. Canada's Underground Trade in Bear Parts* (Investigative Network, 1995), cited in Soyland, "Criminal organizations ...", p. 35.

[23] Galster, *Crime against Nature* ..., cited in Soyland, "Criminal organizations ...", p. 29.

[24] Personal communication from the Endangered Species Project to Soyland, "Criminal organizations ...", p. 29.

[25] P. P. Kievit, "The worldwide illegal trade in endangered species of wild flora and fauna" (Netherlands, National Police Agency, Environmental Crime Unit, August 1998), cited in Soyland, "Criminal organizations ...", p. 29.

[26] See note 13 above.

[27] See also http://www.smuggled.com/repdru1.htm: "On 29 June 1993, drug enforcement agents at Miami Airport found 36 kilos of cocaine wrapped in condoms and stuffed into boa constrictors."

[28] "The trade in drugs and wildlife", http://www.awionline.org/wildlife/aa-trade.htm

[29] United Kingdom national report to the meeting of the Group of Eight held in June 1999, cited in Soyland, "Criminal organizations ...", p. 44.

[30] The case of Tony Silva shows the interesting story of a bird lover becoming a wildlife smuggler kingpin. He was an authority on protection and breeding of endangered species and condemned people putting their private interest before the survival of species in the wild. After several years of legally breeding birds, Silva began clandestine illegal breeding. Later, he also masterminded large-scale smuggling operations of animals such as endangered parrots and macaws from the Brazilian rainforest. Silva was at the outset charged on 16 counts of wildlife smuggling and one count of tax evasion. He pleaded guilty to one case of wildlife smuggling and tax evasion, and the subsequent charges were dropped. He was sentenced to almost seven years of imprisonment, ordered to pay a $100,000 fine and sentenced to do 200 hours of community service upon completion of his prison term. The smuggling operation was uncovered after a three-year investigation called "Operation Renegade", conducted by United States, New Zealand and Australian wildlife agents. In total, 38 wildlife smugglers were caught. The convictions added up to 47 years in prison and fines totalling $1 million. It is important to note that the targets for that smuggling operation were pet shops and wholesalers in the United States, and that the smugglers themselves apparently did not have direct access to end buyers. See *Outside Magazine*, May 1996, cited in Soyland, "Criminal organizations ...", p. 36.

[31] Information drawn from TRAFFIC Europe. "Eyes and Ears News WWF" (United Kingdom, January 1998), cited in Soyland, "Criminal organizations ...", p. 36.

[32] "Information: TRAFFIC Europe".

[33] According to the information given by Jose Carlos Araujo Lopes, who heads anti-trafficking efforts at the Brazilian Environmental and Renewable Natural Resources Institute (http://www.faunainc.org/article%20exotic%20pets.htm)

[34] See CITES, Doc SC.46.15, p. 15.

[35] See "Interpretation and implementation of the Convention—Enforcement—Review of alleged infractions and other problems of implementation of the Convention", document submitted by the CITES secretariat to the eleventh meeting of the Conference of the Parties, held in Nairobi from 10 to 20 March 2000 (Doc. 11.20.1), p. 5.

[36] http://www.biodiv.org/world/parties.asp.

[37] Access "shall be on mutually agreed terms" and "shall be subject to Prior Informed Consent".

[38] For a critical view, see Manuel Ruiz-Muller, "Regulating bioprospecting and protecting indigenous peoples knowledge in the Andean Community: Decision 391 and its overall impacts in the region", paper prepared for the United Nations Conference on Trade and Development Expert Meeting on Traditional Knowledge, held in Geneva in October and November 2000.

[39] See Ruiz-Muller, "Regulating bioprospecting ...", p. 17.

[40] Information drawn from the FAO Commission on Genetic Resources for Food and Agriculture.

[41] WIPO, "Exclusions from patent protection" (HL/CM/INF/1 Rev), cited in UNEP/CBD/COP/2/17, p. 5.

[42] See also article 9 of the African Model Legislation.

[43] Annex to the Final Act of the Uruguay Round of Trade Negotiations—Annex 1 c of the Marrakesh Agreement.

[44] http://www.twnside.org.sg/title/legal.htm

[45] http://www.caa.org.au/campaigns/election/globalisation/intellectual.html

[46] http://www.twnside.org.sg/title/whats.htm

[47] See article 12, para. 3 (d).

[48] See article 13, para. 2 (d) (ii).

[49] See UNEP/CBD/WG-ABS/1/4, p. 6, footnote 15 (input by Norway).

[50] See the third complementary provision to Decision 391. In addition, Decision 486 of the Andean Community relating to the patenting of traditional knowledge of indigenous and local communities establishes legal recourse that provides for "*nulidad absoluta*" of a patent in cases where prior informed consent of indigenous and local communities was not granted regarding the products or processes to be patented.

[51] See decision V/26 A, para. 15 (d).

[52] See also UNEP/CBD/WG-ABS/1/4, p. 8, and UNEP/CBD/WG8J/1/2.

[53] See UNEP/CBD/COP/2/13, p. 38 (annex II).

[54] In discussion of a proposal (at the Eleventh Conference of the Parties to CITES) to exempt "diagnostic samples" from permit requirements under the Convention, many parties expressed concern that the proposal would create a loophole under which "genetic resources" could be taken for commercial research (under the label "samples") without permits or other government oversight. That question will be investigated during the intersessional period by a working group, whose mandate includes a direct requirement of coordination with the secretariat of the Convention on Biological Diversity.

[55] UNEP/CBD/COP/6/6, pp. 24-25.

[56] Article 47 of Decision 391 of the Andean Community.

[57] Article 67 of the African Model Legislation.